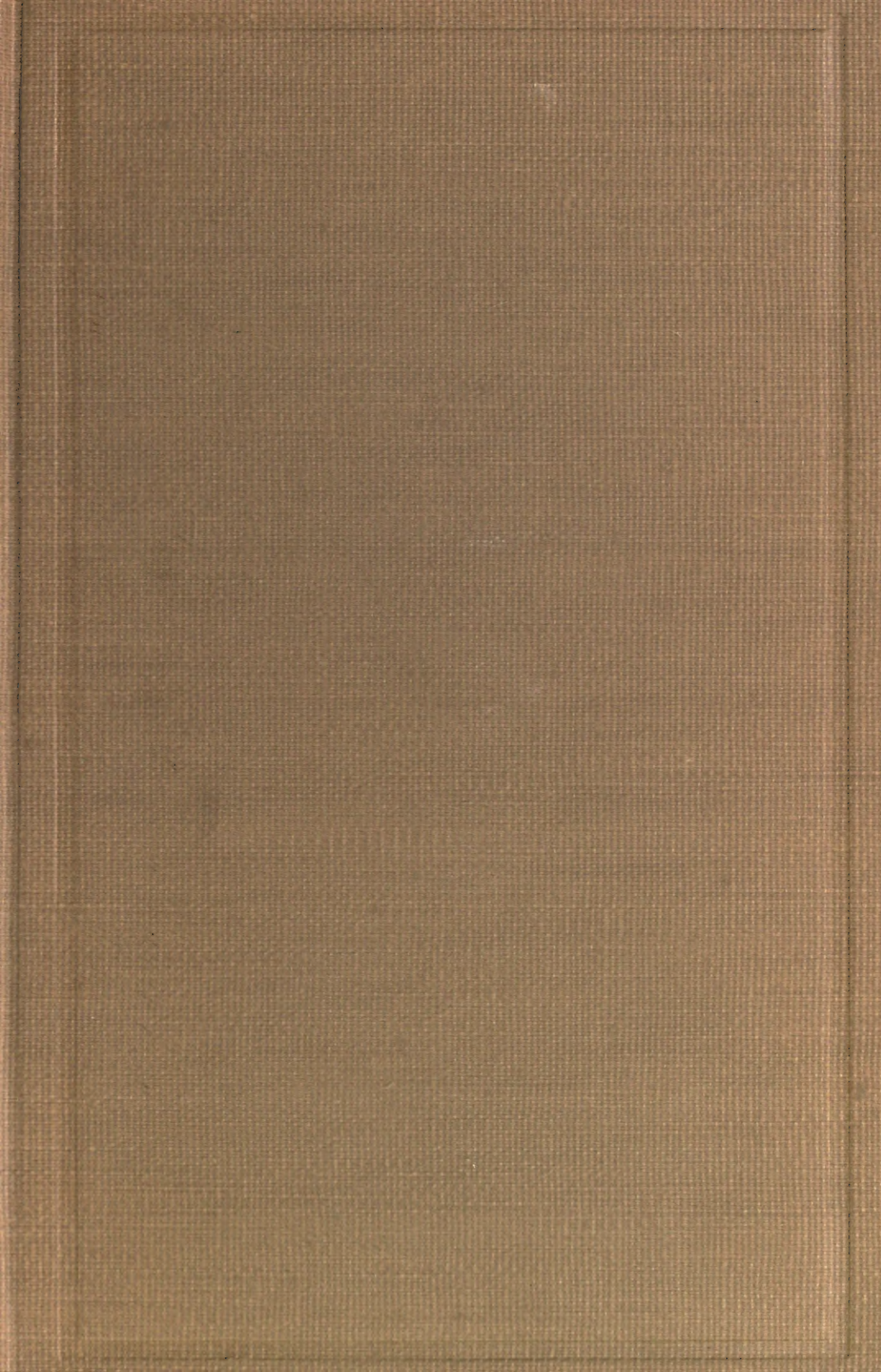






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FOREWORD PAGE

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Buffalo, N. Y.
February, 1951

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REPORTS
OF
CASES
CIVIL AND CRIMINAL
IN THE
UNITED STATES CIRCUIT COURT
OF
THE DISTRICT OF COLUMBIA,
FROM 1801 TO 1841,
IN SIX VOLUMES.

BY WILLIAM CRANCH,
CHIEF JUDGE OF THE COURT.

VOLUME IV.
1830 TO 1836.

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JUDGES
OF THE
UNITED STATES CIRCUIT COURT.

DURING THE TIME OF THESE REPORTS.

HON. WILLIAM CRANCH, CHIEF JUDGE.
HON. BUCKNER THRUSTON, } ASSISTANT
HON. JAMES SEWALL MORSELL, } JUDGES.

DISTRICT ATTORNEYS.

THOMAS SWANN, Esq.
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MARSHALS.

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CIRCUIT COURT OF THE UNITED STATES.

APRIL TERM, 1830, AT ALEXANDRIA.

UNITED STATES *v.* BERNARD A. JERNEGAN.

An indictment for bigamy must be tried in the county in which the second marriage was celebrated.

INDICTMENT FOR BIGAMY. The second marriage was in the county of Washington, D. C.

The COURT (THRUSTON, J., absent,) was of opinion that it could not be tried here, (in Alexandria county,) under the statute of Virginia of 22d December, 1792, c. 104, § 14, p. 195.

NEGRO CHRISTOPHER HARRIS *v.* NELLY ALEXANDER.

The right of a citizen of the United States to import a slave into the county of Washington under the 2d section of the Maryland Act of 1796, c. 67, is forfeited by a sale of the slave within three years after the importation.

PETITION FOR FREEDOM. Verdict for the petitioner.

Motion for new trial, on the ground that a sale within three years after importation into the county of Washington does not, *per se*, give a right to freedom, but is only evidence of importation for sale; and it was agreed that if the Court should be of that opinion, a new trial should be granted; and the counsel referred to the case of *Negro William Jordan v. Sawyer*, in this Court, in Washington, at April term, 1823, [2 Cranch, C. C. 373,] and *Negro Mary v. White*, at December term, 1829, [3 Cranch, C. C.]

The slave was brought into the county of Washington, with the defendant, to reside; but the defendant sold him before the expiration of three years.

By the 1st section of the Act of Maryland of 1796, c. 67, it is enacted, "That it shall not be lawful to import or bring into this

State, by land or water, any negro, mulatto, or other slave, for sale, or to reside within this State; and any person brought into this State as a slave, contrary to this act, if a slave before, shall cease to be the property of the person or persons so importing," &c., "and shall be free."

By the 2d section it is provided, "That it shall be lawful for any citizen or citizens of the United States, who shall come into this State with a *bonâ fide* intention of settling therein, to import or bring into this State, at the time of his or her removal into this State, or within one year thereafter, any slave or slaves, the property of such citizen at the time of his or her said removal," &c.

And by the 3d section it is further provided, "That nothing herein contained shall be construed to enable any person or persons so removing to sell or dispose of any slave or slaves, imported by virtue of this act, or their increase, unless such person, &c., shall have resided within this State three whole years next preceding such sale, except in cases of disposition by will, and dispositions by law for *bonâ fide* debts, or consequent upon intestacy."

Mr. Taylor, for the petitioner. The petitioner having been imported "to reside," is entitled to his freedom, unless the defendant was protected from the forfeiture of the first section by being within the proviso of the second section; and she is not protected by the second section, if the petitioner was sold within three years, contrary to the third section.

Mr. Mason, for the defendant, submitted the case to the Court without argument.

The COURT (*nem. con.*) refused the new trial; being of opinion that the 3d section of the Maryland Act of 1796, c. 67, is a qualification of the license to import given by the 2d section; that is, you may bring your slaves with you to reside, provided you do not sell within the three years. If you sell within the three years you forfeit your privilege under the 2d section.

Judgment for the petitioner.

GEORGE STANBACK v. JOSEPH WATERS.

In an action on the case for receiving the plaintiff's slave in Virginia and bringing him into the District of Columbia, it is not necessary to prove that the defendant knew the slave to be the slave of the plaintiff, although the *scienter* be averred in the declaration.

Difference between the enticing of a servant, and the abduction of a slave.

In an action for enticing the plaintiff's slave from the service of the plaintiff, knowing him to be the plaintiff's slave, the *scienter* must be proved.

ACTION ON THE CASE, for enticing away and receiving the plain-

tiff's slave, named Williamson, in Virginia and bringing him into the District of Columbia.

The 1st count was for enticing Williamson from the service of the plaintiff, knowing him to be the plaintiff's slave.

The 2d count was for receiving the slave and bringing him into the District of Columbia, knowing him to be the plaintiff's slave.

Mr. Taylor, for the defendant, prayed the Court to instruct the jury that the plaintiff was not entitled to recover unless he should satisfy them by evidence that the defendant, at the time, &c., knew that Williamson was the slave of the plaintiff; which instruction the Court gave (*nem. con.*)

But upon reflection, the COURT (THRUSTON, J., *contrà*,) was of opinion, that the *scienter* in the 2d count was immaterial, and therefore need not be proved; because the receiving the slave and bringing him away, is a sufficient cause of action. The forms of declarations for enticing a servant from the service of his master, always aver the *scienter*; because the cause of action is the plaintiff's loss of service; a particular and personal cause of action, not grounded upon a violation of the right of property, but of the right of service. The defendant's knowledge that the plaintiff had that right of service is, therefore, in such a case, material; but if a defendant violates my right of general and absolute property in a chattel, it is not a necessary ingredient of the cause of action, that he should know that it was my property.

Mr. Neale and *Mr. Mason*, for the plaintiff.

Mr. Taylor, for the defendant, cited *Commonwealth v. Turner*, 5 Randolph, 678.

CONNER v. COCKERILL AND GAULT.

If several damages be assessed upon a writ of inquiry on a judgment by default, in an action of assault and battery, against two, the plaintiff may enter a *nolle prosequi* against one and take final judgment against the other.

THIS was a joint action of assault and battery against the master and mate of a vessel. There was judgment by default, and a writ of inquiry, and several damages assessed, namely, one cent against Cockerill, and dollars against Gault.

Mr. Neale, for the plaintiff, moved for leave to enter a *nolle prosequi* against Cockerill, and take judgment against Gault.

Mr. Hewitt, for the defendants, opposed the motion, and cited *Hill et al. v. Goodchild*, 5 Burr. 2790.

Mr. Neale, cited *Ammonett v. Harris & Turpin*, 1 Hen. &

Maynadier v. Duff.

Mun. 488; *Mitchell v. Milbank*, 6 T. R. 199; *Miner v. Mechanics Bank*, 1 Peters, 73; 1 Wheaton's Selwyn.

The COURT (*nem. con.*) was of opinion that the plaintiff had a right to enter a *nolle prosequi* as to Cockerill, and take judgment against Gault.

WILLIAM MAYNADIER v. JAMES DUFF.

Detinue is an action in form *ex contractu* and not *ex delicto*; and is not on that ground to be excluded from the jurisdiction of a justice of the peace.

The justices of the peace in Alexandria county, as single magistrates, have jurisdiction in cases of *detinue*.

THIS was an appeal from the judgment of a justice of the peace in the county of Alexandria, in an action of *detinue* brought by James Duff against William Maynadier, for nine silver spoons and a soup-ladle.

Mr. Taylor, for the defendant, the appellant, contended, that a justice of the peace has not jurisdiction in *detinue*. In Virginia the jurisdiction was given by an Act passed in December, 1806, since the separation of Alexandria county from that State. At common law there could be no execution in *detinue* but a *distingas*, and a justice of the peace, by the law of Virginia, could issue no execution but a *fiery facias*, and by that writ the alternative value in *detinue* could not be made. By the Act of Congress of 1823, [3 Stat. at Large, 743,] enlarging the jurisdiction of justices of the peace, a *fiery facias*, and a *ca. sa.* only are given, so that a justice of the peace has no means of enforcing a judgment in *detinue*. None of the provisions of the Act of Congress apply to such an action. A justice of the peace has jurisdiction only of cases in form *ex contractu*; and *detinue* is in form *ex delicto*. 1 Tidd, 1.

Mr. Taylor, cited Robinson's Forms, 366, 367, and the case of *Barnard v. Herbert*, in this Court, 28 July, 1829, as to the form of execution in *detinue*; also *Jordan v. Williams*, 3 Rand. 501.

Mr. Neale, contra, submitted the case to the Court without argument.

CRANCH, C. J., delivered the opinion of the Court, (MORSELL, J., dissenting.)

In this case it is contended by the appellant, that the justice of the peace had not jurisdiction of this suit because it was in the form of an action of *detinue*, of which the jurisdiction is not given to a justice of the peace, either by the laws of Virginia

existing on the 27th of February, 1801, or by the Act of Congress of March 1, 1823, [3 Stat. at Large, 743,] "to extend the jurisdiction of justices of the peace," &c.

It is said that the justices have jurisdiction only in actions *ex contractu*, and that detinue is an action *ex delicto*. 1 Tidd, 1.

Mr. Tidd, in p. 1, says, "Actions upon contract are, account, assumpsit, covenant, debt, annuity, and *scire facias*;" and in p. 5, "actions for wrongs are case, detinue, replevin, and trespass *vi et armis*." Yet in p. 10, he says, "and there is a case where it was held that debt and detinue might be joined in the same action," and for this he cites Gilbert's Com. Pleas, 5, and 1 Bac. Ab. 30. And in p. 93, he says, "Formerly it was not usual to proceed in the King's Bench by original writ in debt, detinue, or other action of a mere civil nature." And in p. 95, 96, he says, "In actions of account, covenant, debt, annuity, and detinue, the original writ is called a *præcipe*, by which the defendant has an option given him, either to do what he is required, or show cause to the contrary; but in *assumpsit* and actions for wrongs it is called a *pone*, or *si te fecerit securum*, by which the defendant is peremptorily required to show cause in the first instance. In point of form the original writ is special or general — *nominatum vel innominatum*. The former contains the time, place, and other circumstances of the demand very particularly; the latter only a general complaint without expressing the particulars, as the writ of trespass *quare clausum fregit*," &c. And in p. 105, he says, "The first process or proceeding upon the original writ in actions of account, covenant, debt, annuity, and detinue, is a summons;" thereby classing detinue with the actions *ex contractu*. It appears therefore very clearly from Mr. Tidd's own book, that he committed a mistake in his first page in not classing detinue with the actions upon contract. Whether he also erred in p. 5, by classing it with actions for wrongs, is not so clear, yet there is no more wrong in the unjustly detaining a chattel from a man to whom it belongs, than there is in unjustly detaining money which he owes and refuses to pay.

When, in detinue, the cause of action is bailment of a thing to be redelivered, it is clearly an action *ex contractu*; when the cause of action is finding and refusing to deliver the thing to its owner it partakes of the nature of a *tort*; but still the form of action is *ex contractu*, and the plea is *non detinet*, and not *non culpabilis* as in the action of trover and conversion, which, in form, is *ex delicto*. In detinue, the gist of the action is the unjust detainer; in trover, it is the unlawful conversion. In the former the grievance is temporary; in the latter the loss is total.

Mr. Chitty seems to have fallen into the same mistake. In his

first volume on Pleading, p. 87, he classes detinue under both heads. He says, "Personal actions are in form, *ex contractu*, or *ex delicto*; or, in other words, are for breach of contract, or for wrongs unconnected with contract. Those upon contracts are, principally, assumpsit, debt, covenant, and detinue; and those for wrongs are case, trover, detinue, replevin, and trespass *vi et armis*." Yet in a note in p. 117, he says, "as debt and detinue may be joined in the same action, though the judgment is different, (Browlow, *Redivivum*, 186; Gilb. C. P. 5; 2 Saund. 117, *b*,) and as it has been stated that detinue is not sustainable when the goods come tortiously into the defendant's possession, (3 Bl. Com. 152, *post*, 119,) I have therefore considered this action under the head of actions *ex contractu*."

In p. 117, 118, he says, "It lies upon a contract for not delivering a specific chattel in pursuance of a bailment or other contract. But as, to support this action, the property in some particular chattel must be vested in the plaintiff, *assumpsit*, or debt in the *detinet*, is the only remedy for the non-delivery of corn, &c., sold, where no specific corn was contracted for."

In page 121, he says: "This action is, in most cases, still subject to wager of law; on which account it was not much in use till that mode of trial became obsolete, but now it is frequently adopted."

In page 122, Mr. Chitty again says: "Personal actions, in form, *ex delicto*, and which are principally for the redress of wrongs unconnected with contract, are case, trover, detinue, replevin, and trespass *vi et armis*." And in a note to the word "detinue," in this passage, he says: "We have already considered this action, which, we have seen, lies for the non-delivery of goods according to a contract, and therefore it is unnecessary to give it further consideration."

Mr. Chitty seems to have confounded two ideas which ought to have been kept distinct, namely, the cause and the form of action. The cause of action may really arise *ex delicto*, and yet the party may, perhaps, in some cases, by waiving the *tort*, have remedy by an action in form, *ex contractu*; and this may be the reason why Mr. Chitty has classed detinue under both heads. When the owner has lost his goods, and they are found by a stranger, who refuses to deliver them to the owner, detinue lies; and yet there was no contract unless the law, in civil cases, will imply that every man has contracted to do what, in law, he was civilly bound to do. The cause of action, if not exactly *ex delicto*, is *quasi ex delicto*; yet our ancestors, more than six hundred years ago, gave a remedy by a writ in form, *ex contractu*, and even gave the very writ of debt itself, as well as detinue, for

goods unjustly detained. See the forms of writs of debt in the *Registrum Brevium*, 139; 1 Bac. Ab. 30; 2 Id. Debt, F, and the cases there cited; Rastell's Entries, 150, (a) where there is the form of a declaration in debt for money, joined with detinue for goods, in the same count, and wager of law as to both causes of action. And in Rastell's Entries, fol. 174, (a) is the form of the judgment, in a like case, for the plaintiff's debt and damages, and also for ten quarters of malt, or the value thereof, and a *distingas* awarded as to the malt, and a writ of inquiry of damages for the detention of the malt and of the value of the malt, in case it should not have been delivered to the plaintiff. And in Coke's Entries, 158, (a) pl. 32, is an action of debt, for money, in the *debet* and *detinet*, and for goods in the *detinet*, in one count. See, also, Fitzherbert's *Natura Brevium*, 273, 274; Debt for Chattels; 3 Woodeson's Lectures, 103; 1 Rol. Ab. 604; Brook's Ab. Debt, pl. 211.

"The judgment in debt," Mr. Woodeson says, "is for money or goods demanded, and if the goods cannot be had, then for the value, which, if not found by the original verdict, may be ascertained by a writ of inquiry and verdict thereon."

Mr. Woodeson classes detinue under the head of personal actions founded on contract; and in p. 104 he says: "Detinue has a very close affinity to the last species of debt, and is, indeed, hardly distinguishable from it, except, perhaps, that in detinue the property is supposed to be vested before action brought. Where a plaintiff purposes to recover a specific chattel, this action may be sued, and it may arise either *ex contractu*, as bailment, or the accidental possession and wrongful detention of goods."

Bacon, (1 Bac. Ab. 28,) who takes his language from Gilbert's Com. Pleas, p. 4, says: "Personal actions are *ex contractu*, or those founded on contract, as debt, which is to restore the thing *in numero*, or detinue, which is to restore the thing in specie, or damages, where it cannot be had; also, actions of covenant, *assumpsit*, *quantum meruit*, *quantum valebat*, covenant, and annuity; or, *ex delicto*, as trespasses founded upon force, which are trespasses *vi et armis*; or, upon fraud, which are actions upon the case."

In the case of *Kettle v. Bromsall*, Willes' Rep. 120, C. J. Willes took it for granted that trover and detinue could not be joined. See, also, Mr. Durnford's note to the same case.

Upon the whole, I am satisfied that detinue is an action in form *ex contractu*, and not *ex delicto*, and is not, on that account, to be excluded from the jurisdiction of a single justice of the peace.

Let us now see whether it is given to a single magistrate, under the statutes of Virginia.

By the Act of 3d December, 1792, concerning the county and other inferior courts, Rev. Co. p. 84, § 5, all causes of less value than five dollars, (or two hundred pounds of tobacco,) except prosecutions on penal statutes, are expressly excluded from the jurisdiction of the county courts.

By the 6th section, "When the cause of action shall not exceed five dollars, (or two hundred pounds of tobacco,) the same is hereby declared to be cognizable, and finally determinable by one justice of the peace who may give judgment and thereupon award execution against the goods and chattels of the debtor, or party against whom such judgment shall be given, which shall be executed and returned by the sheriff or constable to whom directed, in the same manner as other writs of *feri facias* are to be executed and returned; but no execution shall be by him granted against the body of the defendant."

By the 37th section of the same act, "Any debt or penalty amounting to more than five dollars, (or two hundred pounds of tobacco, and not exceeding twenty dollars, or eight hundred pounds of tobacco,) may be demanded, by petition to the court of a county, city, or borough." "And the defendant being summoned," "the Court shall and may hear and determine the matter in dispute in a summary way," "and give such judgment as shall appear to be just."

And by the 38th section, "Any person may, by petition, to be served and tried in like manner, demand and recover goods detained, or the value of them, and damages for the detention; or damages for goods found by the defendant, and converted to his use, where the goods, with the damages, are not of greater value than twenty dollars, (or eight hundred pounds of tobacco.*)" And "Whosoever shall bring any other action than a petition, if it appear, either by his own showing in the declaration, or by the verdict of a jury, that he might have brought a petition by this act, shall be nonsuit."

It is evident, that, by the 5th section of this act, the county court has not jurisdiction of detinue in a cause of less value than five dollars; and that, by the 6th section, such a cause is cognizable and finally determinable by one justice of the peace, who has authority to award execution against the goods and chattels of the party against whom the judgment shall be given.

The 37th and 38th sections only authorize the county courts to exercise their jurisdiction in a summary way, in certain causes, and confine the jurisdiction of those causes to the county or corporation courts, and do not, in any manner, affect the jurisdiction given by the 6th section, to a single justice of the peace.

The Act of the 16th of January, 1801, only extends the juris-

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diction of a single justice of the peace to causes of ten dollars value, in cases where they had, before, jurisdiction to the value of five dollars.

If a justice of the peace had not jurisdiction in detinue, in causes of five dollars value, no court had; for all causes of less value than five dollars were expressly excluded from the jurisdiction of the county courts by the 5th section of the act.

Thus the law stood in Alexandria county on the 27th of February, 1801, when the laws of Virginia were adopted by the Act of Congress [1 Stat. at Large, 103,] "concerning the District of Columbia," by which justices of the peace were to be appointed who should, "in all matters, civil and criminal, and in whatever relates to the conservation of the peace, have all the powers vested in, and perform all the duties required of, justices of the peace as individual magistrates, by the laws thereinbefore continued in force in that part of the District, and should have cognizance in personal demands, to the value of twenty dollars, exclusive of costs." And thus their jurisdiction continued until the 1st of March, 1823, when the Act of Congress [3 Stat. at Large, 743,] was passed, "to extend the jurisdiction of justices of the peace, in the recovery of debts in the District of Columbia."

This act, it is said, contains provisions and terms inconsistent with the nature of the action of detinue, and with the process necessary to enforce the judgment; and, therefore, even if detinue to the value of five, or ten, or twenty dollars, could be maintained before a single justice, yet it cannot be maintained where the value is over twenty dollars.

The expressions and terms relied upon as designating the nature of the causes of action whereof jurisdiction is intended to be given to the justice of the peace, and to limit it to a certain species of personal actions, are the following, to wit: In the 1st section, the words, "debt and damages," "debtor," "creditor and debtor," "an interest thereon," that is, on the judgment; in the 6th section, the words "debt or damage;" in the 7th section, the words "debt or demand;" in the 9th section, the words "debtor and his sureties;" in the 10th section, the words "small debts;" and in the 15th section, the words "sum demanded."

An argument is also drawn from the circumstance, that the only kinds of execution, mentioned in the act, are *ca. sa.* and *fi. fa.*; and that no provision is made for a *distringas*, which is the proper process to enforce the judgment in detinue.

But the 3d section, which authorizes the justice to issue execution, does not designate the kind of execution. The words are, "authorized to issue execution or *fieri facias*, in the same manner

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as executions are now issued by the clerk of the Circuit Court of the District of Columbia." Whatever execution the clerk could issue, the justice may issue.

It is true that the only executions named in the 9th section, are *ca. sa.* and *fi. fa.*; but that section is only applicable to executions upon *supersedeas*.

The 13th section also speaks only of *ca. sa.* and *fi. fa.*, but it has no negative words to control the general authority given by the 3d section, or to exclude a *distringas*, or such an execution as was issued by this Court, in the case of *Barnard v. Herbert*, in July, 1829.

If a justice of the peace has jurisdiction in debt, or detinue, for goods, I see nothing in the act to prevent his issuing a proper execution.

The argument drawn from the words "debt" and "debtor," &c., is answered, by showing, that, at common law, an action of debt will lie, as well for a specific chattel as for a sum of money; and that, by the civil law, a man is said to be debtor for a specific article, as well as for the performance of a specific duty.

I mention the civil law, because the original jurisdiction of a justice of the peace, in civil cases, and the manner of trial and appeal, are all analagous to the rules of that law, and seem to me to be founded thereon.

Upon the whole, I am satisfied that the justices of the peace in Alexandria county have jurisdiction in cases of detinue. I am also satisfied by the evidence, that Mr. Maynadier had no authority to sell the spoons at private sale, and that the judgment ought to be affirmed.

Judgment affirmed. MORSELL, J., dissenting.

CIRCUIT COURT OF THE UNITED STATES.

MAY TERM, 1830, AT WASHINGTON.

DAVID STONE *et al.* v. WILLIAM LAWRENCE.

A note, payable on its face, "at St. Louis, in the Territory of Missouri," cannot be given in evidence upon a count on the note, not so describing it; but it may be given in evidence upon the count for money had and received; and a motion to appear without special bail, was overruled.

ASSUMPSIT, by the payees, against one of the makers of a joint and several promissory note, dated at Michillimackinack, on the 31st July, 1819, for \$6,497.17, and payable at St. Louis, in the Territory of Missouri, to the plaintiffs or order.

Upon the return of the writ, this note was produced as the cause of action. The declaration had two counts upon the note, but did not state that it was payable at St. Louis, or dated at Michillimackinack, or elsewhere. There was a third count, for money had and received.

Mr. R. S. Coxe, for the defendant, moved to enter the defendant's appearance without bail, and cited the case of *Hyer and Burdett v. Smith*, at May term, 1829, [3 Cranch, C. C.]

CRANCH, C. J., delivered the opinion of the Court.

The note, being payable at St. Louis, and not so described in the declaration, cannot be given in evidence upon either of the counts upon the note. There is a substantial difference between the note produced and the note described in the declaration. The plaintiffs were not bound to receive the money at any other place than St. Louis, nor were the defendants bound to pay it at any other place, until they had failed to pay it at St. Louis, according to the terms of the contract. There is, therefore, a material variance between the note produced and the counts founded upon it.

See the following cases: *Sheehy v. Mandeville*, 7 Cranch, 208; *Ferguson v. Harwood*, *Ib.* 408; *United States v. McNeal*, 1 Gall. 387; *Pope et al. v. Barrett*, 1 Mason, 117; *Munns v. Dupont et al.* 2 Wash. C. C. Rep. 465; *Trask v. Duvall*, C. C. U. S. Ap.

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1821, MS. Coxe's Dig. 729; *Smith v. Barker*, 3 Day, 312; *Page's Administrator v. Bank of Alexandria*, 7 Wheat. 35.

But there is a count for money had and received, upon which the note is evidence, especially as the suit is between the original parties to the note, that is, the payees against the maker. *Harris v. Huntbach*, 1 Burr. 373; Chitty on Bills, 1st Ed. 191, part 2, ch. 2.

This case differs from that of *Hyer & Burdett v. Smith*, in this Court, at May term, 1829. (3 Cranch, C. C.) In that case, there was not, at the time of the arrest of the defendant, any count in the declaration sent with the writ, upon which the bill of exchange would have been evidence. But here is a count for money had and received, which, we think, may be supported by the note. In that case the question arose upon an amendment made by the plaintiff, and which he was obliged to make, to let in the bill of exchange as evidence upon either of the counts. The count upon the bill averred it to be indorsed to the plaintiffs, Hyer & Burdett, but the bill offered in evidence, was indorsed to Hyer, Burdett, and Bremner. This objection was as fatal upon the money counts as upon the count on the bill, for it was evidence of money had and received, to the use of three, when there were only two plaintiffs; the amendment, therefore, introduced a new cause of action. But here the question is not whether the plaintiff shall amend his declaration, but whether the note is evidence upon the count for money had and received.

If the plaintiff should ask leave to amend his declaration, and he should amend it, it may be a subsequent question whether the bail shall be discharged.

Motion to appear without bail, overruled.

Hall, for the plaintiffs.

ANDREW JACKSON v. J. W. SIMONTON.

Upon an informal bond given by a marshal, payable to the President of the United States and his successors, instead of to the United States, the Court held the defendant to bail upon a certificate of defalcation from the treasury department.

THIS was an action of debt on a bond given to Andrew Jackson, President of the United States, and his successors in office, dated June 6, 1829.

The condition was "that whereas John Dean aforesaid has been duly appointed marshal of the southern judicial circuit of the United States District Court, (at Key West,) of the Territory of Florida. Now if the said John Dean will faithfully and im-

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partially discharge all and singular the duties incumbent on him as such, then this obligation to be void, otherwise to remain in full force and virtue.

Jno. Dean, (L. s.) J. W. Simonton, (L. s.) J. Whitehead, (L. s.) R. D. Richardson, (L. s.)”

“Teste: Elizabeth B. Hutchinson, Mary B. Hutchinson, Edward Stubbs.

The following indorsement is on the bond :

“The within bond is accepted as a temporary compliance with the requirement of the law, and to serve until Mr. Dean can have an opportunity to see the judge and obtain his approbation. M. Van Buren, June 10, 1829.”

Mr. Swann, district-attorney, produced a certificate from the Treasury Department, with all the forms required to make it evidence under the Act of Congress in that case provided, that John Dean stands charged with the sum of \$2500, due and unaccounted for by him; and contended that this is as good as an affidavit to hold to bail.

Bail required by the Court, (*nem. con.*)

BETTY H. BLAKE, Appellant, v. G. C. GRAMMER, Appellee.

The lessor's title ceased by a sale of the property. The tenant did not attorn nor in any manner acknowledge himself to be tenant to the vendee, but continued to use and occupy the premises for five years after the sale; the vendee not having taken possession, or demanded the rent: Held, that the lessor, the plaintiff, could not recover from her tenant, in an action for use and occupation, the rent for the time he thus continued to use and occupy the premises.

THIS was an appeal from the judgment of a justice of the peace who *non-prossed* the appellant in an action for \$25, for the use and occupation of certain premises for five years, at five dollars a year, under a sealed lease from the plaintiff to the defendant.

The facts of the case appeared to be as follows: Mrs. Blake, the appellant, being the executrix of her late husband, Doctor James H. Blake, on the 27th of October, 1819, made a deed of trust to Alexander Kerr, of the lot in question, among others, to secure a debt due to her husband to the Bank of the Metropolis, with power to sell, in default of payment; but, until sale, she was to continue in the enjoyment of the estate. On the 24th of March, 1821, by an agreement under seal she rented to the defendant, G. C. Grammer, a part of one of the lots, upon which he was to put up a fence at his own expense, and use the ground as an entrance, or alley to his own lot; for which he was to pay

Mrs. Blake an annual ground-rent of \$5, for every year he should occupy that part of the lot; and it was "particularly understood that at any time Mrs. Blake disposes of the lot by sale or otherwise, or in case she wishes to build upon it, said Grammer is to clear and relinquish whatever he may have inclosed belonging to said lot, and then the above covenant does terminate." He continued to pay the rent until the 24th of March, 1824. The property was sold by Mr. Kerr under the deed of trust, on the 7th of September, 1824.

Long after the sale, but whether before or after the justice's warrant was issued in this cause, the witness could not recollect, Mr. Kerr, in conversation with the appellee, told him that the bank was entitled to the rent, to which he made no objection. The bank never demanded the rent, and the appellee never promised to pay it to the bank, and has not paid it, and never attorned to the bank, or in any manner acknowledged himself tenant to the bank.

Mr. Wallach, for the defendant, contended that the plaintiff was not entitled to recover the rent which accrued after the sale made by Mr. Kerr under the deed of trust, and cited *Perry v. House*, 1 Holt, 171, note; *England v. Slade*, 4 T. R. 682, and *Doe v. Watson*, 2 Stark. 230; S. C. Serg. & L. 328.

Mr. Morfit, for the plaintiff, contended that the tenant who has used and occupied the premises under the lessor cannot dispute his title, and cited *Balls v. Westwood*, 2 Camp. 11; *Wilson v. Townshend*, 2 Ves. Jr. 696; *Doe v. Smith*, 4 M. & S. 347. The cases cited by *Mr. Wallach*, are cases of ejectment; this is for use and occupation. The defendant is bound to pay the rent until he is evicted.

CRANCH, C. J. In ejectment the defendant may show that the plaintiff's title has expired, because the plaintiff can only recover by the strength of his own title; and, by bringing the action, has admitted that the possession of the defendant is adverse.

In replevin the plaintiff can show that the defendant's title has expired, because he must have a reversionary interest to entitle him to distrain.

But in an action for use and occupation the tenant cannot deny the title of his landlord. He has had the use and enjoyment of the property, and cannot deny the validity of the title under which he has had that enjoyment. His possession is the possession of his landlord, and if a stranger brings ejectment, his landlord is to defend the suit, and will be answerable for mesne profits if the stranger should recover.

In the present case Mr. Grammer has enjoyed the use of the property under the possession given him by Mrs. Blake. That

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possession has not been changed or disturbed. He has continued to hold from year to year, and his term, as I understand it, has not expired.

It is true that he covenanted to clear and relinquish the property if, at any time, Mrs. Blake should sell or dispose of the lot, or in case she should wish to build; and that upon his so clearing and relinquishing the lot, the covenant should terminate. But this seems to me to be a covenant for the benefit of Mrs. Blake; and if she does not require him to clear and relinquish the lot, and he still keeps possession, it is not for him to say that the covenant is terminated. The bank might have brought ejectment against Mrs. Blake, and afterwards recovered from her the mesne profits, for which Mr. Grammer would be liable to her, to the extent of the rent reserved. If he refused to attorn to the bank, or if the bank never demanded of him either the rent or the possession, he continued to hold under her.

I am therefore of opinion that she is entitled to recover for the five years' use and occupation for which she has sued. But if not entitled to the whole five years' rent, she is certainly entitled to recover for rent due before the sale which appears to be at least six months; perhaps a year, if he was entitled to six months notice to quit.

But the COURT was of opinion that the covenant had terminated with the sale, and that as the contract was under seal, this must be considered as an action of covenant.

CRANCH, C. J. The covenant was not terminated until Mr. Grammer "cleared and relinquished what he had inclosed." For Mrs. Blake was liable for the mesne profits until the bank should get possession, (which, it does not appear that they have yet obtained,) and therefore has a right to look to Mr. Grammer upon his covenant and occupation.

Judgment affirmed with costs.

BRECKENRIDGE, Executor of White, v. PETER'S EXECUTORS.

A court of equity will not give relief against a judgment at law, upon the ground of usury, if the question of usury was decided in the suit at law, although the bill allege such a defect of evidence as would have been the ground of a bill of discovery. A bill of discovery is an ancillary process, and not for original relief. In order to obtain ultimate relief in equity there must be other ground than the mere defect of evidence in an action at law.

BILL for injunction to stay proceedings on a judgment at law upon a bond including compound interest, which was alleged to be usurious.

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Mr. Wallach and *Mr. Jones*, for the complainant, cited *Connecticut v. Jackson*, 1 Johns. Ch. Ca. 14, and *Lewis v. Bacon*, 3 Hen. & Munf. 89.

Messrs. Key and *Dunlop*, *contra*, alleged that the question of usury had been settled in the action at law and could not be litigated again in a court of equity, and cited *Brown v. Brent*, 1 Hen. & Munf. 4; *Peirce v. Rowe*, Adams's Vermont, Rep. 179; *Hastings v. Wiswall*, 8 Mass. Rep. 455; *Ossulston v. Yarmouth*, 2 Salk. 449, and *Lansing v. Eddies*, 1 Johns. Ch. Rep. 49.

CRANCH, C. J., delivered the opinion of the Court, (*MORSELL, J.*, not sitting in this cause.)

This is a bill for an injunction to stay proceedings on a judgment at law obtained by the defendants against the plaintiff, as executor of James White upon a bond dated 2d September, 1795, given for principal and compound interest upon a former bond dated 27th May, 1789, for £892 9s. 11d. sterling, payable on demand with lawful interest from the date.

The bill avers that compound interest was charged upon the £892 9s. 11d. sterling; several payments having been made from time to time; some of them not amounting to the interest due at the time of such payments; and that since the bond of September 2d, 1795, sundry payments were made by the complainant. That upon the trial of the suit at law upon that bond, the present complainant "not being able to prove the omission of the credit or the usurious mode of calculating the interest on the said bonds, in any other way than by the oath of the plaintiffs at law, and the books of the said Robert Peter, a verdict was rendered against him for \$897.07 with interest from 1st January, 1803, till paid and costs of suit," which judgment was afterwards superseded by the complainant.

The defendants, in their answer, deny that they have any knowledge or belief of any credits not given; and aver that the question of interest was settled at the trial at law.

The injunction was dissolved in 1826, and the bill continued; and the cause has now come on to be heard upon the bill, answer, and general replication, exhibits, and depositions taken under the commission.

The bill, although it alleges the imbecility, and intemperate habits of James White, does not contain such an allegation of fraud as will authorize the Court to grant relief upon that ground, even if it were made out in proof; but it is not.

The only questions, remaining, are,

1st. Whether the transaction be usurious; and, if usurious, whether this Court can give relief, upon that ground, after the trial, at law, of the same question. and 2d. Whether there has

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been a mistake made in ascertaining the amount due, for which the bond, of the 2d of September, 1795, was given.

The question of usury was tried and settled in the suit at law; and I apprehend it is too late, after the trial at law, to allege such a defect of evidence as would have been the ground of a bill of discovery.

A bill for discovery is an ancillary process, and not for original relief. In order to obtain ultimate relief in equity, there must be other ground than the mere defect of evidence in an action at law.

There is no evidence of mistake of fact in the ascertainment of the sum for which the bond of the 2d of September, 1795, was given. The complainant has, himself, produced a statement, made by Colonel Thompson at the time, which shows exactly the manner in which the parties came to the result; which statement was furnished to Mr. White some months before the bond was given. The bond, therefore, cannot be impeached on the ground of mistake.

We think, therefore, that the bill must be dismissed with costs.



NEGRO HARRY QUANDO v. CLAGETT.

Constructive emancipation of slaves by will.

PETITION FOR FREEDOM. Mrs. Clagett made her will, as follows:

"In the name of God," &c. "After my decease it is my will that my woman Maria, and all her increase, including the children that she now has, to be free and manumitted forever; and that the money that is now due to me, be received by Thomas Clagett, and for the support of the said Maria and her children until the last of May next; and I also desire that my woman Rhoda, and all her increase to be free and manumitted after serving the term of two years where Elizabeth Osborn shall hire her anywhere in the district, and the hire to be applied to the getting of the said children good places, and paying Elizabeth Osborn for her trouble. My will is that my man Harry is to serve one year to any person that will give a fair hire for him, one half to be applied to the support of Maria and her children, and the other part to himself. In witness whereof," &c.

Mr. Key, for the petitioner, cited *Dolly Mullen's case*, or *Hall's case*, 5 Har. & Johns. 190.

Mr. Marbury, *contra*, contended that having used proper words of emancipation in regard to her other slaves and omitted

them in Harry's case, the testator must have intended to manumit the former only.

May 14th. The COURT was of opinion, (*nem. con.*) that there could be no doubt of the intention of the testatrix to emancipate the petitioner. The whole object of her will evidently was the emancipation of her slaves.

T. B. BEALL'S EXECUTORS v. MARGARET DICK *et al.*

An official copy of a mortgage of real estate is sufficient evidence, in equity, in Washington county, D. C. of the existence of the original mortgage, and of the debt due thereon.

BILL to foreclose a mortgage of real estate in Georgetown, D. C. made by John Peter to T. B. Beall, the plaintiffs' testator. John Peter afterwards sold the land to Elizabeth Peter, who devised it to the defendants, Margaret Dick and others. The plaintiffs averred that the debt was still due and that the mortgage was a subsisting mortgage, and exhibited an office-copy. The debt and mortgage were admitted by the defendant, John Peter, the mortgagor, but not by the defendants, Margaret Dick and others, the devisees of Mrs. Peter, who called for proof of the execution of the mortgage and that the debt and mortgage were still subsisting and unsatisfied.

The mortgage was made on the 4th and recorded on the 9th of August, 1809. The deed from John Peter to Elizabeth Peter was dated the 16th of April, 1810.

Mr. Jones, for the defendants, Dick *et al.*, denied that the office-copy is evidence of the mortgage. There is a difference between mortgages and ordinary deeds of conveyance. A mortgage may be discharged by indorsement on the original deed; by acknowledgment of satisfaction, or tearing off the seal; or by destroying the instrument. Enrolment, in this country, is considered as implied notice in law, but not conclusive in equity. If the original is lost it should have been so averred in the bill, and that it was a subsisting security, and a subsisting debt; these defendants might then have denied the facts. They have had no notice that the plaintiffs meant to rely upon this copy. It is the common practice to exhibit copies in all cases, whether the originals are in the possession of the plaintiff, or not; and the originals are produced at the hearing, and, if denied, may be proved *ore tenus*.

Mr. Marbury, and *Mr. Coxe*, *contrà*. When a copy of a deed of lands from the record, is produced, it is not necessary to produce the original deed, unless the original be particularly called

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for by previous notice, and then only when the execution of the original is put in issue. The copy is evidence of the existence of the original; and it is presumed to exist in full force until the contrary is shown. It is not necessary for the plaintiffs to aver that it is not cancelled; or not destroyed, or lost. But it is not a fact to be put in issue to the jury. It is a fact to be ascertained by the court, even at law; and *à fortiori* in equity, as a ground for admitting secondary evidence. An exemplification of the record of the deed is as good evidence as the deed itself.

The COURT (MORSELL, J., not sitting in this cause,) was of opinion that the exemplification of the record of the mortgage was sufficient evidence of the existence of the mortgage and of the debt; and also permitted the affidavit of one of the plaintiffs to be read, as to the loss of the original deed. CRANCH, C. J., however, very much doubting as to the propriety of admitting the affidavit, as the court was of opinion that it was not incumbent upon the plaintiffs to produce, or to show the loss of, the original mortgage.

See Maryland law, 1785, c. 9, § 7, "or a full copy of the same from the record."

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At the time of the complainant's giving the single bill, it was expected and understood by both parties, that the whole amount might be satisfied by the services of the complainant, and that such services, as far as they should be actually rendered, should be set off against the bill. Services, to an indefinite extent, the value of which was not ascertained, were admitted to have been performed; and it was not denied that the complainant was always ready and willing to perform all that should be required of him.

Held, that the complainant had a right, under the original contract, to have the value of those services ascertained and set off against the bill. Injunction continued till final hearing.

BILL for an injunction to stay proceedings upon a judgment at law upon a single bill for \$766.65 given by the complainant to J. & P. Turner, and by them assigned to the defendant McKim.

Upon the coming in of the answers of the defendants,

Mr. Lear, for the defendants, moved to dissolve the injunction, and *Mr. Tabbs*, for the complainant, filed exceptions to the answer of the defendants J. & P. Turner.

The COURT (*nem. con.*) overruled the exceptions; and as to the matter of equity in the bill,

CRANCH, C. J., delivered the opinion of the Court. The next questions are, 1st. Whether there is equity in the bill; and 2d. Whether the matter of that equity is denied by the answer.

It is no equity that the complainant has an off-set at law to the defendants' action at law against him. Nor is it any matter of equity that the complainant has a claim for unliquidated damages, for breach of contract, against these defendants which could not be set off at law, unless it be accompanied by an allegation of the insolvency of these defendants, or some other impediment to the complainant's maintaining an action at law for such unliquidated damages; neither of which is averred in the bill.

If there be any equity in the bill, it grows out of the true nature of the contract between the parties.

Apparently it is a single bill acknowledging an absolute debt under hand and seal. According to the allegations of the bill, the debt is admitted, but it is said that it was not intended to be paid in the ordinary mode, by money, but by services, and that therefore it is inequitable in the defendants to avail themselves of the legal advantage which the form of the instrument has given them to enforce payment in money, the complainant having been always ready to perform the services which might be required.

The form of the instrument is certainly such as to throw the burden of proof upon the complainant to show that the contract was different from that which it purports to be.

Neither fraud, nor imposition, nor mistake is alleged. The bill avers that the single bill for \$766.65, was executed and delivered by the complainant, to the said Turners, "upon the express understanding that the said Turners were to give him all their law business;" "and that he should never be called upon to pay the said note, but that the whole amount was to be taken out in professional services; and expressly charges that the said Josiah did, for himself, and in the name of the said firm, proffer and make those terms."

That "the Turners did not employ him in all their law business, as agreed as aforesaid," "although he was ready and willing to transact any that they offered to him."

In the answer of J. & P. Turner, they deny that they or either of them, at the time of taking the note, or at any time thereafter, ever did agree to take it all out in law, unconditionally. They deny that it was executed and delivered to Josiah Turner, with an express agreement that the complainant never was to pay the same, or that he was never to be called on for payment thereof, as charged in the complainant's bill; but they admit that Josiah Turner said, that, if he would come to St. Mary's to reside, he would give him all his business, with that also of the firm of Josiah Turner & Co.; and that, in such case, the payment of the note would come easy to him; and that the greater part of it, on such conditions, would be taken out in law; and promised, at the

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same time, that if the complainant would determine on it then, this defendant would set him to all the cases of the firm; and might have said, "provided the complainant came to St. Mary's to reside, and took charge of their business, that he might never be called on for payment."

The defendant Josiah also denies, that, at the time of taking the note, or at any time since, he promised the complainant to give him the individual and private law business of Philip. And the defendants aver that the whole of the said conversations and conditional promises grew out of the complainant's stating, at the time they were about to take his note, that he thought of coming to St. Mary's to reside, which conditions were never complied with by the complainant.

It is evident, then, from the bill and answer, that, at the time the single bill was given, it was expected and understood, by both parties, that the whole amount might be satisfied by the services of the complainant; and that such services, as far as they should be actually rendered, should be set off against the obligation. Services, to an indefinite extent, the value of which is not ascertained, are admitted to have been performed, and it is not denied that the complainant was always ready and willing to perform all that should be required of him.

The complainant, then, has a right, under the original contract, to have the value of those services ascertained and set off against the bill; and if it shall appear, upon final hearing, that the promise to give him the whole law business of the firm was not upon a condition not performed by the complainant, and that he was always ready to give his services, and that the business has been given to another, it may possibly happen that equity will relieve him entirely from the obligation.

We think, therefore, that the injunction ought to be continued until final hearing.

UNION BANK OF GEORGETOWN v. CLEMENT SMITH, Administrator
of Samuel Robertson.

In the administration of the estate of a deceased person, debts are always to be paid according to their respective dignity, as regulated by the law of the country where the representative of the deceased acts, and from which he derives his powers; not by the law of the country where the contract was made.

THE case agreed, states that "Samuel Robertson, a native of the State of Maryland, a purser in the navy of the United States,

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and as such, purser for several years before his death, stationed and domiciled at Norfolk, in the State of Virginia, died in the year 182 , at Bedford, in Pennsylvania, insolvent, and indebted to the plaintiffs residing in the District of Columbia, on simple contract entered into there, which debt still remains due and unpaid; and also died indebted to one Thompson, residing in Virginia, upon a specialty executed there, in a sum exceeding the whole amount of assets in the hands of the defendant, to be administered. The said Robertson having died possessed of personal assets in Washington county, in the District of Columbia, the defendant obtained letters of administration upon his estate, in that county, and has collected, and now holds, the sum of \$8,390.01 $\frac{1}{2}$.

The plaintiffs claim a dividend of the assets, according to the laws of administration in force in that county.

The defendant resists payment, upon the ground that the said Thompson claims a priority of payment, as holder of a debt due by specialty, according to the laws of administration in Virginia, where, it is contended, the deceased was domiciled, at the time of his death, and where the debt was contracted, and the obligation given."

Mr. J. Dunlop, for the plaintiffs. His residence in Virginia was as purser of the navy-yard, at Norfolk, in public employ. This is not a domicile, within the meaning of that term, in the cases where distribution is to be according to domicile. That principle is founded on public policy — comity between nations — to encourage foreign commerce. The cases are where the parties claim under the bounty of the deceased, or as heirs and distributees. *Bempde v. Johnstone*, 3 Ves. 200; *Somerville v. Somerville*, 5 Id. 786; *The Venus*, 8 Cranch, 253. There is no case in which the creditors, citizens of the country, have been excluded or postponed to foreign creditors, under a foreign law. The contract is to be expounded according to the *lex loci contractus*, but the remedy is to be according to the *lex fori*. The Virginia creditor must come here for his remedy.

In *Harvey v. Richardson*, 1 Mason, 381, 407, there was no conflicting law of the State that prevented Mr. Justice Story from decreeing according to the principles of the law of nations. There were no debts to be paid. The question was wholly as to the rights of foreigners residing abroad. As between them, the law of their country was to be the rule of decision. The opinion of Mr. Justice Story, in page 422, is a mere dictum. His attention was not drawn to this particular point. He was contemplating only the surplus, after payment of the debts.

Mr. Dunlop also cited the testamentary system of Maryland,

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in force in this county, § 2; c. 3, § 11; c. 8, § 17; c. 5, § 2; *Harvey v. Richardson*, 1 Mason, 407, 410, 417, 418, 421, 422; *Richards v. Dutch*, 8 Mass. Rep. 506, 515; *Stephens v. Gaylord*, 11 Id. 257, 264, 269; *Hunter v. Potts*, 4 T. R. 182, 186, 189, 191, 194; *Sill v. Worswick*, 1 H. Bl. 690; *De Sobry v. De Laistre*, 2 Har. & Johns. 224; *United States v. Harrison & Sterrett*, 5 Cranch, 299.

Mr. Lear, contra. Domicil depends upon circumstances. If his residence be for his private purposes, it is a domicil. But the domicil is admitted in the state of the case. The question is not open.

The COURT said they did not consider the question of domicil open under the words of the case, as stated.

Mr. Lear. The law of the domicil is the law of the contract; and the law of priority of payment, in cases of deceased insolvents, is part of the contract; and creditors in Virginia take a bond rather than a note, because the bond-debt has priority of payment. They have, therefore, a right to the same priority, in all countries. *Pipon v. Pipon*, Ambler, 25; *Sill v. Worswick*, 1 H. Bl. 690; *Philips v. Hunter*, 2 Id. 402-406; *Thorn v. Watkins*, 2 Vez. 35; *Bruce v. Bruce*, 2 B. & P. 226, 229.

Mr. R. S. Coxe, on the same side. Personal property has no locality; it follows the person, and must be transferred and transmitted according to the law where the owner is. This is the foundation of the rule of the law of domicil. *Harvey v. Richardson*, 1 Mason, 408, 415. If a man die, leaving goods in twenty-four States, there must be twenty-four administrations, if each is to administer according to the law of the place where goods are found. If the Virginia creditor had taken out letters of administration in Virginia, he might have come here and obtained these assets and taken them to Virginia, where they would have been liable to the Virginia law of priority. *Stephens v. Gaylord*, 11 Mass. Rep. 263, Judge Jackson's opinion. Every administration, not taken out in the place of domicil of the deceased, is an ancillary administration, although no administration should be ever taken out in the place of domicil. In *De Sobry v. De Laistre*, 2 Har. & Johns. 224, there was no question as to the rights of creditors. The general rule is, that the effects must be distributed according to the law of the domicil. It is incumbent on the plaintiffs to show the exception in favor of creditors. If the law of the domicil made the debt primarily chargeable upon real estate, could the creditor come here and charge the personal property, in the first instance?

As to preference of our own citizens, *Mr. Lear* cited *Foliot v. Ogden*, 1 H. Bl. 130, 131; and *Mr. Coxe* cited Toller on Exe-

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cutors, 259, Am. Ed.; *Brody v. Barry*, 2 Ves. & Beames, 130; *Drummond v. Drummond*, 6 Bro. Parl. Ca. 601, new ed.; *De Couch v. Sevitier*, 3 Johns. Ch. Rep. 190, citing Huberus, de Conflictu Legum; *Holmes v. Ramsen*, 4 Johns. Ch. Rep. 460.

Mr. Key, in reply. The administrator is bound by his oath and by his bond, to administer the effects according to law; and the law directs that all creditors, except judgment creditors, should be paid *pari passu*.

This is a suit by a creditor domiciled here; the debt was contracted here, and it may be presumed, upon the credit of the funds here; but a Virginia creditor says his claim is superior in dignity, and must be first paid, according to the law of Virginia. Suppose he assigns his Virginia bond to a citizen of the District of Columbia, it is conceded, by the opposite counsel, that the priority would be assigned with the bond. Suppose the bond had been made here and assigned to a Virginia assignee, it would, upon the same principle, be equally entitled to priority, because the effects here must be distributed according to the law of the domicil. So, if a Maryland creditor of a Maryland debtor were obliged to go into Virginia, and sue the Virginia administrator there, he would be entitled to an equal distribution, although there should be also bond debts. This priority cannot exist in the lifetime of the debtor; it is only given by the positive law of the country where the fund is found.

By comity, the nation in which the fund is found, if it be not the nation of the domicil of the deceased, will distribute that fund according to the law of the domicil, among such as are entitled to the succession.

Personal property originally extends only to goods in possession. When the owner dies the possession is gone, and is no longer evidence of property. At common law no individual had a right to it; there was no right of succession. It is a right depending entirely on positive municipal law. The owner had no natural right to dispose of it after his death. Neither his creditors nor his children had any natural right to the goods after his death. The law makes a will for him if he does not make one for himself. The law of the domicil regulates this matter. The statute of distribution is a mere substitute for his will. The distributees are as much the objects of his bounty as if they claimed under his will. By not making a will he shows his intent that the distributees shall inherit. He might have cut them off. This comity is only applicable to the right which the owner has voluntarily to dispose of his effects, where such disposition is not contrary to his contract, nor to the rights of creditors, nor to the municipal laws of the country, where the fund is; made for the

security of creditors, or for the due administration of the fund. The reason of the principle applies only to the distribution of the fund to be distributed among those who are entitled to the succession.

So are the cases, *Peirsol v. Dwight*, 2 Mass. R. 84; so Chancellor Kent, in 4 Johns. 478, says, "if there be no law of the country against it," &c., and in page 471, "it is admitted in all cases," &c., "where no positive law intervenes." So in quoting Huberus, "*sine suo, suorumque prejudicio*;" and again, "except in cases where it is not against the positive law," &c.

The COURT (*nem. con.*) stopped *Mr. Key*, and said they were, at present, satisfied. CRANCH, C. J., said he would look into the cases, and if any doubt should arise, he would mention it to the counsel.

August 2d, 1830. CRANCH, C. J., delivered the opinion of the Court.

If I understand the argument in support of this defence, it is this: Every contract is to be expounded, and to have effect, according to the law of the place where, or in reference to which, the contract was made. By the law of Virginia where this specialty contract with Thompson was made, it is entitled to priority of payment out of the effects of the deceased debtor. That those effects are to be administered according to the law of the place of domicile of the debtor at the time of his death, although found in a jurisdiction where a different rule of administration prevails. That as all the rights in relation to personal property depend upon the law of the place of domicile of the owner, the effects here must either be transmitted to that place of domicile for distribution, or must be distributed here according to the laws of that place.

Therefore, either upon the ground that the priority of payment is a privilege annexed to, or is part of, the original contract, and therefore accompanies it wherever it is to be enforced; or upon the ground that the personal estate of the deceased is to be distributed, or disposed of, according to the law of the domicile, it is contended that this debt due by specialty, to the Virginia creditor, is entitled to priority of payment out of the assets in the hands of the defendant.

The principal case cited in support of this defence, is *Harvey v. Richards*, 1 Mason, 381, decided by Judges Story and Davis, in the Circuit Court for the District of Massachusetts, in the year 1818; and this is relied upon, not for any point decided in the cause, but for certain *dicta* which fell from the learned judge who pronounced the opinion of the court.

In page 421, Mr. Justice Story, speaking of the opinion of the

Supreme Judicial Court of Massachusetts, in the cases of *Richards v. Dutch*, and *Dawes v. Boylston*, in which that court had decided that the personal effects of a foreign testator, collected there, must be sent to the foreign tribunal for final settlement and distribution, says, "but no reasons are given for this particular doctrine." "There is, too, a qualification of its doctrine in favor of creditors, the ground of which it would be most desirable to ascertain. Why should not legatees and distributees be entitled to recover out of the assets here, as well as creditors? It is true that legatees claim by the bounty of the testator; but it is a legal right as fixed and vested as the right of a creditor; and as to distributees the case is still stronger; for that rests not on the bounty of the intestate, but on the law of the land, which at the same time enables the creditor to receive his debt out of the assets, and the next of kin to claim the residue. If it be said that it belongs to the public policy of the country to sustain the claim for debts due to its citizens, it seems to me no less to belong to that policy to sustain any other claims of its citizens which are founded in justice and law. If it be said that the assets are to be distributed by a foreign law, and it is very difficult and laborious to learn what that law is, and to apply it correctly, the same objection applies to the payment of debts. The priority of debts, the order of payment, the marshalling of assets for this purpose, and the cases of insolvency, the mode of proof as well as distribution, differ in different countries. And if, in case of debts, the court here is to apply the *lex domicilii*, the same embarrassment will arise as in other cases of distribution to the next of kin. There is no more difficulty in the order of payment of legacies than of debts; and courts of law must, in these cases, ascertain and apply the foreign law, precisely as they do in other cases. I pressed the learned counsel for the defendant, at the argument for a solid ground on which to sustain the distinction in favor of creditors, either upon principles of national comity or public convenience, or substantial justice. I heard no vindication of it in either view. And cases may readily be imagined in which such a distinction might work injustice. Suppose that by the *lex domicilii* the debts are primarily a charge upon the realty, and not on the personal estate, shall the creditor here be permitted to exhaust the personal assets here, when the succession to the real and personal estate may be different in the foreign country. Suppose the assets abroad and at home have a different order of succession and distribution, shall the creditor here be permitted to defeat that order? If not, then the court here must apply the *lex domicilii* to protect the heirs, and must ascertain the nature and extent of that law; and if so, why not

proceed to distribute the property among those who are the *cestuis que trust* entitled to it?" And in page 423, he says, "I confess myself unable to admit the distinction in favor of creditors, without admitting, at the same time, the like rights in favor of legatees and heirs; nor have I been able to find that distinction sustained, or adverted to, in any other authorities."

The argument, drawn from these expressions of the judge, is this: It is admitted on all hands that the surplus of a deceased foreigner's movable goods, after payment of his debts, is to be distributed according to the law of the domicile. The judge cannot perceive any reasons to distinguish between the case of distributees and that of creditors. If there be none, then the personal effects found here, if insufficient to pay all his debts, must be apportioned among his creditors according to the law of his domicile, and not according to the laws in this country.

But the question before the judge was whether his court had a right to distribute the surplus, or was bound to send it for distribution to a foreign tribunal; and he argues from the admitted right of the court to order the debts to be paid out of the fund, that it had also a right to distribute the surplus. The rule, by which the distribution of the surplus should be made, was admitted. There was no question as to the rule by which the debts should be paid. The argument, that because the court had a right to order the payment of the debts, it had also the right to order the distribution of the surplus, cannot be converted into an argument, that because that distribution is to be made according to the law of domicile, therefore the order of the payment of the debts of the testator is to be regulated by the same law. The rule that the succession of movables is to be regulated by the law of the domicile of the deceased is now a well-settled rule of the law of nations and will prevail wherever it does not interfere with the municipal law of the place where the effects are found. It results from the principle, that the owner of personal goods has a right to dispose of them wherever they may be. Every sovereign is interested in the wealth of his subjects, wherever situated, because in proportion to that wealth will be his capacity to raise a revenue for the support of his government. Vattel, B. 2, c. 7, § 81. An alien friend has a right, by the law of nations, to withdraw his funds whenever he may please. If he is restrained by the government of the country it becomes a national affair, to be settled by negotiation or war. The sovereign of the owner of the goods, having such an interest in them, has a right, (in case his subject shall not in his lifetime have directed the succession of the goods,) to provide for that succession by law; for the goods composing part of the wealth of the nation are always

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under the protection of the sovereign. Vattel, B. 2, c. 8, §§ 109, 110. But the sovereign of the country, in which the goods are found, is equally bound to protect the wealth of his subjects; and if the foreign owner of the goods die indebted to his subjects, he may insist that such debts shall be paid before the goods are withdrawn from his jurisdiction.

Every civilized nation is bound to afford to all persons within its jurisdiction the means of obtaining justice; but whoever applies to the tribunals for justice, is bound to receive it according to the forms, and subject to the regulations of the country to whose forums he resorts. We are bound by the comity, if not by the law of nations, to afford to foreigners, as well as to our own citizens, the means of obtaining payment of the debts due to them; and if the funds of a foreigner are found here, they may, by the municipal law of the country, be made liable for the payment of such debts; but those who resort to the funds, whether they be foreigners or citizens, must be content to take their remedy in such manner, and to such extent, as the municipal law will permit. It is not for a foreigner to say, that if the funds were in his own country his debt would have a preference, unless, indeed, a lien shall have attached before the funds shall have been subjected to the municipal law of this country; in which case he might, perhaps, be considered as owner to the extent of such lien. But with regard to the distribution of the surplus, the sovereign of the country in which a foreigner's goods are found, has no concern. He has no interest but to protect it as he is bound to protect all the other property of strangers within his jurisdiction. He cannot, consistently with the law of nations, detain it from the country to which it belongs. *Hog v. Lashley*, 6 Br. Parl. Ca. 580, 581. But if the subjects of that country come to his tribunals for aid to assert their rights, he is bound by the comity of friendly nations, to grant it; and in granting it, his tribunals will decide upon those rights according to the laws of the country to which the property belongs, and under whose laws they derive their title.

Hence results the difference between the rule for the order of payment of debts, which must be according to the *lex loci rei sitæ*, and the rule for the order of distribution of the surplus, which must be according to the *lex loci domicilii*. (See *Hog v. Lashley, ut supra*.)

All the cases cited by the defendant's counsel are cases of distribution, or disposition of the surplus; which, in truth, is the only part of the property subject to the *lex domicilii*; for all that part of the property which goes to the payment of debts is to be disposed of according to the *lex loci rei sitæ*; it being made liable

only by the municipal law of that place. The law of nations only decides the question, what law shall regulate the succession of that property, of which the deceased could have disposed in his lifetime; it does not decide the question by what law his property shall be applied to the payment of his debts. In this country, and probably in most other civilized countries, the personal estate of a deceased person cannot be lawfully administered without some special authority derived from the municipal law of the place where the property is found; and, in general, security is required, that the executor or administrator should administer it according to certain rules prescribed by that law. Such authority and such security are required by the laws in this country. After payment of judgments and decrees against the deceased, the other debts are to be paid *pari passu*, whether due by specialty or by simple contract. A foreign creditor cannot participate in this fund unless in conformity with these municipal regulations. He must take his dividend according to the rule prescribed. None of the authorities which show that the distribution is to be made according to the *lex domicilii*, allege that the same law applies to the payment of debts; but almost all of them exclude from the operation of the rule, cases in which the rule is contravened by the municipal law of the country in which the property is found.

Thus, in *Hunter v. Potts*, 4 T. R. 186, Mr. Law, arguing in favor of the validity in a foreign country, of an assignment under the English bankrupt acts, says, "both Lord Talbot and Lord Mansfield recognized the right of suit by the assignees in foreign countries; to admit which is to admit the substitution as made by the *lex loci*, which always takes place as to movable effects, except as far as it is contravened by the municipal laws of those countries where the character is to be exercised." And Mr. Bower, who argued the same case on the other side, in p. 189, 190, says, "governments so act with confidence to each other, that they will recognize one another's laws, provided they do not clash or interfere with their own, or injure their own subjects."

Lord Kenyon, in delivering the opinion of the Court, in the same case, says, "therefore the only question here is, whether or not the property, in that island, passed by the assignment, in the same manner as if the owner, the bankrupt, had assigned it by his voluntary act. And that it does so pass, cannot be doubted, unless there were some positive law of that country to prevent it. Every person, having property in a foreign country, may dispose of it in this; though, indeed, if there be a law in that country, directing a particular mode of conveyance, that must be adopted."

In *Sill v. Worswick*, 1 H. Bl. 691, Lord Loughborough, in delivering the opinion of the court, and speaking of the rules of

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personal property being governed by the law which governs the person of the owner, says, "but it may happen, that in the distribution of the law in some countries, personal property may be made the subject of securities, to a greater or less extent, and in various degrees of form. It is in those cases only that any difficulty has occurred." And in p. 693, he says, "It by no means follows that a commission of bankrupt has an operation in another country against the law of that country."

So in the case of *Philips v. Hunter*, in Error, 2 H. Bl. 405, the court said, "This being the principle of those laws," (the bankrupt laws,) "it seems to follow, that the whole property of the bankrupt must be under their control, except in cases which directly militate against the particular laws of the country in which it happens to be situated." "It is true," (say the judges in that case,) "that the laws of the country where the property is situated, have the immediate control over it, in respect to its locality, and the immediate protection afforded it; yet the country where the proprietor resides, in respect to another species of protection afforded to him and his property, has a right to regulate his conduct relating to that property." "The property, which this country protects, it has a right to regulate." And in p. 409, they say, "When it is argued, that in many instances the bankrupt laws of this country do not operate in another, it is to be observed, that though to some purposes they do not, yet to all civil purposes they do, when such purposes are neither repugnant to the law of the particular state, nor to the general law of nations."

Lord Kames, in his *Principles of Equity*, B. 3, ch. 8, § 3, p. 275, says, "Movables, on the other hand, occasionally in Scotland, belonging to a foreigner, are held to be foreign effects, not regulated by the law of this country. The occasional connection with this country yields to the more intimate connection with the proprietor who is a foreigner. For this reason, a foreign assignment of such movables, formal according to the *lex loci*, will be sustained by the Court of Sessions acting as judges in foreign matters. And for the same reason, an executor named by the proprietor, will have a good claim to such movables, provided he complete his title *secundum consuetudinem loci*. And even though the proprietor here occasionally fall sick and die, the Court of Session will prefer those who are next of kin according to the law of his country, and if he be an Englishman, for example, will sustain letters of administration from the Prerogative Court, as the proper title." "The nomination of an executor by will, is, it is true, an universal title, effectual *jure gentium*, which, therefore, ought to be sustained everywhere; but letters from the Prerogative Court of Canterbury, for example, will not be sustained

here even though granted to the next of kin. The powers of that court are confined within its own territory, and therefore the next of kin must be confirmed here." In p. 277, he says, "With respect to process, as well as with respect to legal execution, no circumstance is regarded but *locoposition* merely, however occasional or accidental. A judge has authority over every person and every legal subject within his territory; and to whatever country goods may belong, the proprietor, or a creditor, must claim them from the court to which they are subjected for the time. No other judge can give authority to apprehend the possession, or to seize them by execution for payment of debt." And in § 4, p. 278, he says, "Deliberating upon this matter, it appears evident, that as payment must be demanded in the forum of the debtor, the form of the action which is brought against him, the method of procedure, the execution that passes upon the decree, and what person is liable as heir in place of the debtor dying before payment, must all be regulated by the law of the debtor's country.

"On the other hand, with respect to titles derived from the creditor, whether *inter vivos*, or by succession, these naturally are regulated by the law of the creditor's country. Thus, an assignment, made in Scotland according to our form, of a debt due by a person in a foreign country, ought to be sustained in that country as a good title for demanding payment. And a foreign assignment of a debt due here, regular according to the law of the country, ought to be sustained by our judges." "The same of succession. If a man make a settlement of his effects, according to the forms of his own country, that settlement ought to be sustained everywhere. And if he die intestate, the heir that is called to succeed him by the law of his own country, ought to be entitled to his movable effects, wherever situated, and to demand payment from his debtors, wherever found. The reason is, that when a man forbears to make a deed regulating his succession, it is understood to be his will, that the law of his own country take place. If he be satisfied with the heir whom the law calls to his succession, he has no occasion to make a settlement."

In 1 Atk. 19, Lord Hardwicke says, that although the chancellor has no power over the persons of foreigners any longer than while they are in England, yet he may lay his hand on any property they may have there in stocks, &c.

In *Potter v. Brown*, 5 East, 131, where the question was whether a discharge of a citizen of Maryland, under the insolvent law of Maryland, was a bar to the action of an English creditor suing in England, Lord Ellenborough said, "It is every day's experience to recognize the laws of foreign countries as binding

on personal property ; as in the sale of ships condemned as prize by the sentences of foreign courts, the succession to personal property, by will or intestacy of the subjects of foreign countries. We always import, together with their persons, the existing relations of foreigners as between themselves according to the laws of their respective countries ; except indeed where those laws clash with the rights of our own subjects here, and one or other of the laws must necessarily give way, in which case our own is entitled to the preference. This having been long settled in principle and laid up among our acknowledged rules of jurisprudence, it is needless to discuss it any further."

That cause (*Potter v. Brown*) was decided upon the principle that as the Maryland law clashed with the rights of the English subjects ; and that, as one or the other of those laws must give way, the preference was to be given to the English law.

In *Hog v. Lashley*, 6 Br. Parl. Ca. 579, the counsel who argued in support of the power of the owner of the property to transfer it, wherever situated, said, "A man may, no doubt, alienate his property of whatever kind, provided he does not thereby transgress the law of the country where it is situated." And again in p. 582, it is admitted by the counsel, that "it is a general rule with respect to process and execution, as well as making up legal titles to any subject, that the forms of the country where the proceedings are instituted, must be observed."

Vattel (B. 2, c. 7, § 85,) says, "In the same manner the validity of a testament, as to its form, can only be decided by the judge of the domicile, whose sentence, delivered in form, ought to be everywhere acknowledged. But, without affecting the validity of the testament itself, the bequests contained in it may be disputed before the judge of the place where the effects are situated, because those effects can only be disposed of in conformity to the laws of the country ;" (that is, as I understand it, agreeably to the forms of transfer required by those laws.)

In the case of *Richards v. Dutch*, 8 Mass. R. 515, although the court held that legatees of a foreign testator must resort to the courts of the testator's country for payment of their legacies, yet that the administrator here is bound to pay the debts of the testator ; and that the defendant here might set off against the claim of the administrator any legal claims which they could establish as creditors of the estate of the deceased ; but could not set off legacies.

And in *Dawes v. Boylston*, 9 Mass. R. 355, 356, Mr. Justice Sewall, in delivering the opinion of the Court, said, "The administration granted in this State has been justly styled ancillary in respect to the administration in the jurisdiction of the peroga-

tive court. The defendant has an authority to collect, and to pay, debts, and is liable for the contracts and duties of the testator, recoverable, and which may be enforced within this jurisdiction; but is not liable to the court of probate upon any partial account to be there rendered and adjusted, to a decree either of payment or of distribution, whether for a legacy, or to any claiming by a supposed succession of the deceased's effects."

And in the case of the *Selectmen of Boston v. Boylston*, 4 Mass. R. 324, the same judge, in delivering the opinion of the court, says, "The administration granted to the respondent, with the will annexed, of Thomas Boylston, is to be considered not only as a means of collecting the effects of the testator within this jurisdiction, but of answering, according to the rules of the same jurisdiction, the demands of creditors, and all legal liens on those effects."

In *Harvey v. Richards*, 1 Mason, 394, the counsel for the respondent, who was contending that the surplus should be remitted to the *forum domicilii* for distribution, says, "This State, influenced by the comity which exists between different countries upon this subject, invests the person pointed out by the original administrator, with authority to collect these effects; and in return for this indulgence, requires that the debts due to its own citizens shall be paid, (before these funds are withdrawn,) either ratably or fully according to the laws of that country."

Mr. Webster, on the other side, said, "It is difficult to perceive the reason why debts are to be paid and legacies not paid, or the surplus not distributed. By the law of England, assets are to be marshalled, and judgments and bond debts are to be paid before debts by simple contract. If a simple contract creditor be found here, his debts having been contracted in India and with reference to the laws of that country, may he obtain satisfaction out of the funds here, and have judgment creditors and bond creditors unpaid in India? It would seem at least to be equitable, that debts contracted in India should be paid according to the laws of India, wherever the fund might be found. A general rule that all debts, asserted here, wherever contracted, should, in all cases, be paid out of the funds here, would seem to be as objectionable as the supposed rule that legatees and next of kin, must in all cases resort to the forum of the domicil."

In the same case, Mr. Justice Story, in delivering the opinion of the court, (in p. 413,) said, "That there ought to be no universal rule on the subject; but that every nation is bound to lend the aid of its own tribunals for the purpose of enforcing the rights of all persons having title to the fund, when such interference will not be productive of inconvenience or conflicting equities." And

again he says, "I utterly deny that the administrator here cannot be compelled to account to any competent tribunal for all the assets which he has received under the authority of our laws."

Again in p. 415, he says, "Each of these administrations may be properly considered as a principal one with reference to the limits of its exclusive authority; and each might, under circumstances, be deemed an auxiliary administration." And again in p. 423, he says, "The administrator here is not a mere agent of the administrator abroad. He collects and receives the assets in his capacity as administrator generally; and so far as it may be wanted for payment of debts and legacies, he holds it in trust for the creditors and legatees, and, as to the residuum, for the next of kin."

"Could the administrator abroad sue the administrator here to recover the assets collected here? I suppose not. The creditors, legatees, and heirs are the only persons competent to sue in respect of their own interests; and the administrator, as such, could have no remedy."

And in p. 428, he says, "The administrator here is not the less administrator because he is not clothed with the same character abroad." "It is sufficient that he is the exclusive representative of the deceased, as to those assets."

In the case of the *Selectmen of Boston v. Boylston*, 2 Mass. R. 388, it is said to be a rule of law well established, "that the rights of parties to property are governed by the *lex loci*, but the remedy, or form of recovery, by the law of the country where that remedy is sought, or where process is issued for its recovery." And in *Peirsol et al. v. Dwight*, 2 Mass. R. 84, 89, which was an action in Massachusetts upon a note made in New York, Mr. Chief Justice Parsons, in delivering the opinion of the Court, said, "The party claiming the benefit of this note, has sued it originally in a court of this State. The law of the State of New York will therefore be adopted by the court, in deciding on the nature, validity, and construction of this contract. This we are obliged to do by our own laws. So far the obligation of comity extends; but it extends no further. The form of the action, the course of judicial proceedings, and the time when the action may be commenced, must be directed exclusively by the law of this Commonwealth. These are matters not relating to the validity of the contract; and to permit the laws of another State to control the court in its proceedings concerning them would intrench upon the authority of our own laws unnecessarily, and for no principle of common utility. Cases may be supposed in which this permission might be injurious to our citizens."

The chief justice had before said, in the same case, "It is a

general rule, that personal contracts entered into and to be performed in any one State, and which are there valid, are to be considered as valid in every other State." "This rule is subject to two very important exceptions; First, that neither the State in whose court the contract is put in suit, nor its citizens may suffer any inconvenience by giving the contract effect; and secondly, that the consideration of the contract be not immoral."

Huberus, in his title *de Conflictu Legum*, vol. 2, lib. 1, says, "*Præscriptio et executio non pertinent ad valorem contractûs, sed ad tempus et modum actionis instituendæ, quæ, per se, quasi contractum, separatumque negotium, constitit; adeoque receptum est, optimâ ratione, ut in ordinandis judiciis, loci consuetudo ubi agitur, etsi de negotio alibi celebrato, spectetur.*"

And, with regard to this principle of comity of nations, he says, "*Rectores imperatorum id comiter agunt ut jura cujusque populi, intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis, ejusque civium, præjudicetur. Verum tamen non ita præcise respiciendus est locus in quo contractus est initus, ut si partes alium, in contrahendo, locum respexerint, ille non potius sit considerandus. Nam, contraxisse unusquisque in eo loco intelligitur, ne quo ut solveret, se obligavit.*" Dig. 7, 21, 44.

And again he says, "*Effecta contractuum, certo loco initorum, pro jure loci illius alibi quoque observantur, si nullum inde civibus alienis creetur prejudicium in jure sibi quæsito;*" in which case he says, "*Magis est, in tali conflictu, ut jus nostrum, quam jus alienum, servemus.*"

These passages are cited by Mr. Fonblanque with approbation in his note to the Treatise of Equity, B. 5, c. 1, § 6, vol. 2, p. 442.

And Mr. Chief Justice Marshall, in delivering the opinion of the Supreme Court of the United States in the case of *Harrison v. Sterry et al.* 5 Cranch, 298, says, "The words of the acts which entitle the United States to a preference, do not restrain that privilege to contracts made within the United States, or with American citizens. To authorize this court to impose that limitation on them, there must be some principle in the nature of the case which requires it. The court can discern no such principle. The law of the place where a contract is made, is, generally speaking, the law of the contract; that is, it is the law by which the contract is expounded. But the right of priority forms no part of the contract itself. It is extrinsic; and is rather a personal privilege, dependent on the law of the place where the property lies, and where the court sits which is to decide the cause. In the familiar case of the administration of the estate of a de-

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ceased person, the assets are always distributed according to the dignity of the debt as regulated by the law of the country where the representative of the deceased acts and from which he derives his powers; not by the law of the country where the contract was made." See also *Fenwick v. Sears's Administrator*, 1 Cranch, 259, and *Dixon's Executors v. Ramsay's Executors*, 3 Cranch, 323, 324.

So in the case of *Lewis v. Fullerton*, 1 Randolph, 23. The Court of Appeals in Virginia say, in regard to the *lex loci contractus*, "If, then, this contract, made in Ohio, had an eye to the State of Virginia for its operation and effect, the *lex loci* ceases to operate. In that case it must, to have its effect, conform to the laws of Virginia. It is insufficient under those laws to effectuate an emancipation, for want of due recording in the county court. It is also ineffectual, within the Commonwealth of Virginia, for another reason. The *lex loci* is also to be taken subject to the exception that it is not to be enforced in another country when it violates some moral duty, or the policy of that country; or is inconsistent with a positive right secured to a third person or party by the laws of that country in which it is sought to be enforced. In such a case, we are told, *magis jus nostrum quam jus alienum servemus*. That third party, in this case, is the Commonwealth of Virginia."

So also in the case of *Holmes v. Remsen*, 4 Johns. Ch. Rep. 472, Chancellor Kent says, "The true question is whether it be not wise and politic, and just, where no positive law intervenes, and where it is not repugnant to the essential policy and institutions of the country, to adopt the rule of international law which other nations apply to us, and which impairs no right, but promotes general justice, and is founded on the mutual respect, comity, and convenience of commercial nations. Huber has placed this subject on proper grounds when, speaking of the effect of the law of the foreign domicile operating upon property in another jurisdiction, he says, *Non vi legis immediatæ, sed accedente consensu potestatis summæ in alterâ civitate, quæ, legibus alienis in loco suo exercitis, præbet effectum, sine suo, suorumque præjudicio, mutæ populorum utilitatis respectu; quod est fundamentum hujus doctrinæ*. Lib. 1, Tit. 3, *De Conflictu Legum*, § 9."

See also the case of *Desobry v. DeLaistre*, 2 Har. & Johns. 224, to the same effect.

These authorities are perfectly satisfactory to show, that even if this were a question as to the construction of the original contract by the *lex loci contractus*, the law of Virginia would not prevail in a conflict with the laws of this district, in a court of this district. But it is not a question as to the construction of the

original contract. The right of priority forms no part of the contract, and could only arise in case the debtor should die insolvent, before payment of the debt. The contract itself does not provide for that case. The law of Virginia, which gives the priority, relates only to the remedy of the creditor in case such an event should happen, and could operate only upon such effects of the deceased, as should be found in that State. The law of that State, as such, cannot operate upon property out of its territory. If other States, in which the property of a citizen of Virginia may be found, permit the succession to go according to the law of Virginia, it is because it is part of the law of such States that the succession should be regulated as it would have been regulated by the law of Virginia if the property had been found there. But if the laws of those States should provide that the debts of the deceased shall be first paid out of the property, in a certain ratio, those laws must prevail, because all property, within the limits of a State, is subject to the laws of that State; and if a foreign law be permitted, in any manner to regulate the disposition of such property, it is because the State, in which the property is found, permits it as a matter of comity. This is expressly stated by Huberus, in a sentence next following one of those already cited, where he says, "*Ex quo liquet hanc rem non ex simplici jure civili, sed ex commodis, et tacito populorum consensu, esse petendum.*"

Upon the first opening of this case the Court had not the least doubt upon the point, and nothing but respect for the learned counsel who have raised the question, and the ingenuity of the argument founded upon what we suppose to be a misapprehension of the observations of a very learned judge, could have induced this Court to give its reasons for the opinion it has formed upon what it deemed to be a well-settled point of law, namely, "That in the administration of the estate of a deceased person, the assets are," as stated by C. J. Marshall, in *Harrison v. Sterry*, 5 Cranch, 298, "to be distributed according to the dignity of the debt as regulated by the law of the country where the representative of the deceased acts, and from which he derives his powers, not by the law of the country where the contract was made.

Judgment for the plaintiff on the case agreed.

CUSHWA v. FORREST.

In an action by the vendor for the price of a blind horse sold to the defendant by the plaintiff, if the defendant prove fraud in the sale he need not show that he offered to

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return the horse; for fraud vacates the contract, and the plaintiff cannot recover upon it; *aliter* where the action is brought by the vendee to recover back the purchase-money paid for the horse.

ASSUMPSIT for the price of a blind horse sold by the plaintiff to the defendant.

Mr. Key, for the defendant, prayed the Court to instruct the jury, "that if they should believe from the evidence that the horse sold to the defendant was affected before, or at the time of the sale, with a latent disease in his eyes, materially impairing the value of the horse, of which he afterwards went blind; and which ordinary skill and attention could not discover, and that the same was known to the plaintiff, then it was the duty of the plaintiff to disclose such defect; and if he sold him without doing so, but purposely concealed the same, and the defendant bought him without knowing such defect, then the sale was fraudulent, and the plaintiff is not entitled to recover in this cause."

Mr. Jones, contra, cited 2 Selw. N. P. 584, 586; *Hunt v. Silk*, 5 East, 452, that the parties must be put *in statu quo*; Stark. on Ev. part iv. p. 586; *Wynn v. Thornton*, 12 Wheat. 193; *Lewis v. Cosgrave*, 2 Taunt. 2.

The COURT (THRUSTON, J., *contra*,) gave the instruction prayed by *Mr. Key*, and observed that there was this difference between the case of an action by the vendee to recover back the purchase-money on the ground of fraud and that of a vendee resisting, on the same ground, an action by the vendor to recover the purchase-money; that in the former case the vendee must show that he offered to return the thing sold; but when the vendee is defendant, he is not bound to show such an offer to return; but it is sufficient for him to show the sale to be fraudulent; for fraud avoids every contract; and this distinction reconciles the cases upon the subject.

It was admitted, by the plaintiff's counsel, that the burden of proof was on the defendant.

 BANK OF COLUMBIA v. ALPHEUS J. HYATT AND D. WILSON.

The defendant will not be permitted to plead the statute of limitations after the expiration of the rule to plead.

If one, only, of two joint defendants, be taken, who pleads *non assumpsit*, and issue be joined thereon, and the defendant taken offers ready for trial, at the trial term, the plaintiff has not a right to continue the cause until the other defendant be taken, but must amend his declaration by suggesting, or averring that the other defendant is not yet taken; and upon such amendment the defendant may have leave to plead *de novo*.

ASSUMPSIT, against Hyatt and Wilson upon their joint indorse-

ment in the name of the firm, of Harding's note for \$172.50. Hyatt only having been taken, pleaded *non assumpsit* and the statute of limitations on the 4th of December, 1828, the rule to plead having expired on the first Monday of November, 1828.

Mr. Lear, for the plaintiffs, moved the Court to reject the plea of limitations because it was too late.

The COURT (THRUSTON, J., absent,) rejected the plea.

The defendant then pleaded *non assumpsit*, upon which issue was joined, and offered himself ready for trial.

The declaration was joint, and contained no suggestion that one of the defendants had not been taken.

Mr. Lear declined making the suggestion, and contended that he had a right to continue the cause until the other defendant should be taken, and moved for a continuance on that ground.

But the COURT refused, and intimated that the plaintiffs were bound now to amend their declaration by adding the suggestion, or to become *nonsuit*; and that if the declaration be now so amended, the defendant taken might have leave to plead *de novo*.

The plaintiffs then had leave to amend their declaration, and the defendant to plead *de novo*, who thereupon pleaded the statute of limitations; and the plaintiffs, at the next term, entered a *non-pros*. (See Tidd, 326, 327; Barnes's Notes, 396, 401; Tidd, 125, 362.)

JAMES WILLIAMSON v. TENCH RINGGOLD, Marshal, &c.

REPLEVIN will lie for the goods of a stranger taken in execution as the goods of the debtor, if taken out of the actual or constructive possession of the plaintiff.

Upon the plea of property in the defendant, the burden of proof is on the plaintiff.

An absolute bill of sale is fraudulent as to creditors, unless accompanied and followed by possession.

REPLEVIN for the plaintiff's goods taken in execution by the defendant, as marshal of the District of Columbia, at the suit of *Thomas Carberry v. John Wells, Jr.*

Mr. Morfit, for the defendant, moved the COURT for a return of property, on the ground that it was in the custody of the law under a *fiery facias* against Wells at the suit of Thomas Carberry, and cited *Cromwell v. Owens*, 7 Har. & Johns. 55, 60, 61; *Meany v. Head*, 1 Mason, 322; *Pritchard v. Stephens*, 6 T. R. 522; *Thompson v. Button*, 14 Johnson, 84; *Mills v. Martin*, 19 Johnson, 7; *Ilseley v. Stubbs*, 5 Mass. R. 280; and 6 Com. Dig. 490.

Mr. Coxe, contra, cited *Clark v. Skinner*, 20 Johns. 465.

CRANCH, C. J., delivered the opinion of the COURT, (THRUSTON, J.,) dissenting.

This is a replevin for the plaintiff's goods, taken on a *fiery facias*, against John Wells, Jr., at the suit of Thomas Carberry, issued out of this Court.

Mr. Morfit, for the defendant, has moved the Court for a return of the goods under the Act of Assembly of Maryland, 1785, ch. 80, § 14, (and also for a *venditioni exponas*,) because the goods were, as it is said, in the custody of the law, and therefore could not lawfully be replevied, whether the plaintiff in replevin was, or was not, the owner of the goods at the time of the taking, and whether they were taken by the marshal out of the actual possession of the plaintiff in replevin, or out of the actual possession of Wells, the debtor in the execution.

It is understood to be admitted in argument, that the goods were the property of the plaintiff in replevin, at the time of the taking by the defendant, and that the defendant took them to satisfy the execution against Wells.

It is not stated whether they ever had been in the possession of the plaintiff, nor whether they were taken from the actual possession of Wells, or from the actual or constructive possession of the plaintiff.

If the goods never had been in the possession of the plaintiff, they must be returned to the defendant under the Act of Assembly, 1785, ch. 8, § 14, upon a *retorno habendo* bond being given by the defendant; for that act strongly implies that the return to the defendant is to be ordered of course, unless the defendant obtained the possession "forcibly or fraudulently;" or that the possession having been first in the plaintiff, "was got, or retained by the defendant, without proper authority or right derived from the plaintiff;" in which case the Court is authorized "to refuse to order a return to the defendant, until a judgment is given in the action."

But, upon such return, when ordered, the defendant must give bond and security to restore the goods to the plaintiff, if such should be the judgment of the Court.

If, therefore, the plaintiff cannot show that the defendant took the goods out of his actual or constructive possession, the return must be ordered, of course, to the defendant. *Cullum v. Bevans*, 6 Har. & Johns. 471.

The motion for a return, upon the ground, that goods in the custody of the law are not to be replevied, is, in effect, a motion to quash the replevin; for if the return should be ordered, it must be without bond; and such an order would be of course, if the plaintiff in replevin were the debtor in the writ of *fiery facias*;

for the law, in that respect, is well settled in this country as well as in England.

But it is not well settled, either there or here, that a man cannot maintain replevin for his goods taken out of his actual or constructive possession by an officer, to satisfy an execution against a third person. In some of the States it is well settled that he can. But in Maryland, the Court of Appeals has lately delivered a solemn opinion, that he cannot, in the case of *Cromwell v. Owens*, 7 Har. & Johns. 60, 61.

In England, it will be found that every case adduced in support of the rule, that replevin will not lie for goods in the custody of the law, are cases where the plaintiff in replevin was the debtor himself.

It is said to be a rule founded upon the policy of the law; and the reason given by Gilbert on Replevins, 161, in the very passage relied upon in support of the rule, is, that "it would be troubling the execution awarded, if the party on whom the money was to be levied should fetch back the goods by a replevin; and, therefore, they construe such endeavors to be a contempt of their jurisdiction; and upon that account commit the offender."

Goods seized and held by a trespasser, cannot, surely, be said to be in custody of the law, except as against the trespasser himself, when they are seized in execution. The policy of the law refuses him the right to question the validity of the judgment, or to deny his interest in the property, by any means that would defeat or delay the execution; but it does not refuse a third person the means of protecting his rights from illegal violation.

The general rule is, that replevin will lie wherever trespass will lie for taking the plaintiff's goods. There is, however, this difference between trespass and replevin, that trespass will lie upon possession alone; but replevin requires property in the plaintiff. All that is necessary to support the action, is property in the plaintiff, either general or special, and a wrongful taking from the plaintiff's possession, either actual or constructive.

The idea suggested by Blackstone, and repeated by several other elementary writers, that replevin will only lie for goods taken by distress, has no foundation.

I have not found it supported by a single adjudged case. On the contrary, the cases are abundant, from the time of the Year Books to the present moment, in which replevin has been supported for goods not taken by distress. Blackstone, (3 Com. 145, b.) says, "The wrongful taking of goods being thus most clearly an injury, the next consideration is, what remedy the law of England has given for it. And this is, in the first place, the restitution of the goods themselves, so wrongfully taken, with

damages for the loss sustained by such unjust invasion; which is effected by action of replevin."

"This obtains only in one instance of an unlawful taking, that of a wrongful distress."

For this assertion, he cites no authority whatever; and it is believed none can be found.

Baron Gilbert, whose Treatise upon the Law of Replevins was published some years before Blackstone's Commentaries, defines the writ of replevin thus; "A replevin is a justicial writ to the sheriff, complaining of an unjust taking and detention of goods or chattels, commanding the sheriff to deliver back the same to the owner, upon security given to make out the injustice of such taking, or else to return the goods and chattels." Gilbert on Replevins, 58. Sellon, vol. 2, p. 153, following Blackstone, says, "Replevin is a remedy grounded upon a distress; for goods are only replevisable when they have been taken by way of distress. But he cites no authority, except Co. Lit. 145, which gives no countenance to such a doctrine. It only shows that replevin is the proper remedy in cases of distress for rent; but not that replevin will not lie for goods not distrained." On the contrary, Lord Coke says, that when the defendant claims property, although upon the plaint the sheriff cannot try the question, "yet the plaintiff may have a writ, *de proprietate probanda*, directed to the sheriff, to try the property; and if, thereupon, it be found for the plaintiff, then the sheriff to make deliverance, (for so be the words of the writ); and if for the defendant, he can no further proceed. But that is but an inquest of office; and, therefore, if thereby it be found against the plaintiff, yet he may have a writ of replevy to the sheriff; and if he return the claim of property, &c., yet it shall proceed in the Court of Common Pleas, where the property shall be put in issue and finally tried."

This passage shows, that replevin will lie to try the title to goods, which have been wrongfully taken from the possession of the plaintiff.

In the action of replevin, neither the writ nor the declaration says any thing of the goods being taken as a distress. The injury complained of is, that the defendant took and unjustly detains the plaintiff's goods, not that he took them for any particular purpose.

In the case of *Shannon v. Shannon*, 1 Sch. & Lefroy, 327, Lord Redesdale says, "Mr. Justice Blackstone's definition of the action of replevin is certainly too narrow. Many old authorities will be found (in the books) of replevin being brought where there was no distress." "It is an action founded on a taking, and the right which the party from whom the goods were taken

has to have them restored to him, until the question of title to the goods is determined."

In the case of *Meany v. Head*, 1 Mason, 322, Mr. Justice Story said; "At common law, a writ of replevin never lies, unless there has been a tortious taking, either originally or by construction of law, by some act which makes the party a trespasser *ab initio*."

In *Ilsley v. Stubbs*, 5 Mass. R. 283, Mr. C. J. Parsons said; "The defendant, to support his plea, has argued, that replevin at common law does not lie, unless where goods are taken by distress as a pledge. It is true, that anciently, replevin was generally sued out to replevy cattle taken by distress as a pledge; but, in fact, replevin lies for him, who has the general or special property in chattels, against him who has wrongfully taken them."

So, in *Shearick v. Huber*, 6 Binney, 2, which was replevin against the purchaser of the plaintiff's goods, at the sheriff's sale, under a *fieri facias* against a stranger, Mr. C. J. Tilghman said; "No doubt but replevin is the proper form of action; for although, in England, this form of action has been generally confined to cases of goods distrained for rent, yet, with us, it has been used in all cases where chattels, in the possession of one person, have been claimed by another."

So, in *Woods v. Nixon*, Addison, 134, the president of the court of common pleas said: "The practice, in Pennsylvania, has been to issue replevin in all cases where a man claims property detained from him."

So, in 2 Wheat. Selwyn, N. P. 896, Selwyn says, "that Blackstone's definition is too narrow;" and Mr. Wheaton, in his note, says, "that replevin lies for any tortious taking of goods from the possession of the plaintiff, and not in case of a distress only, is well settled in England, and has been recognized and adopted as sound doctrine, by the Supreme Court of New York."

Dane, in his Abridgment, vol. 5, p. 515, speaking of Blackstone's definition, says, "it has been truly observed, that this definition is too narrow." "The writ is founded on a taking, and the plaintiff's right to have the goods restored to him until the question of title to them is determined."

And Daniel Dulany, in his opinion given in the year 1771, in the case of *Coursey v. Wright*, 1 Har. & McH. 396, says: "The case supposed, would exemplify the very definition of replevin; 'a remedy, provided by the law, for the specific recovery of personal property unjustly taken and detained;' though Blackstone says, very erroneously, that replevin is only in one instance of unlawful taking, that of a wrongful distress."

In the case of *Hopkins v. Hopkins*, 10 Johns. 373, Mr. C. J.

Kent said, "The action of replevin is grounded on a tortious taking, and it sounds in damages, like an action of trespass, to which it is extremely analogous, if the sheriff has already made a return (of the goods) and the plaintiff goes only for damages for the caption."

Comyns (Dig. Replevin, A.) says, "replevin lies of all goods unlawfully taken."

So, in the case of *Pangburn v. Patridge*, 7 Johns. Rep. 143, Mr. Justice Van Ness, in delivering the opinion of the Supreme Court of New York, said: "The opinion I expressed, on the trial of this cause, that replevin lies only in the case of an unlawful distress, was a mistaken one. The passage to that effect in Blackstone's Commentaries, is not warranted by the books. This action is usually brought to try the legality of a distress; but it will lie for any unlawful taking of a chattel. Possession by the plaintiff, and an actual, wrongful taking by the defendant, are the only points requisite to support the action; and none of the cases, defining the nature of the action, confine it specially to the case of a chattel taken under pretence of a distress. The old authorities are, that replevin lies for goods taken tortiously, or by a trespasser, and the party injured may have replevin or trespass, at his election. This is so laid down by Gascoigne, J., 7 H. 4, 28, b; and by Danby, J., 2 E. 4, 16; and by Brian, J., 6 H. 7, g; and these *dicta* are cited as good law, in Bro. Ab. tit. Replevin, pl. 36, 39, and in Roll. Ab. tit. Replevin, B. The same rule was admitted by the judges in *Mason v. Dixon*, 1 Jones, 173, and in *Bishop v. Montague*, Cro. Eliz. 824. Similar language is held in many of the modern authorities, and particularly by Baron Gilbert, Baron Comyns, and Lord Redesdale. The opinion of the latter is reported by Schoales and Lefroy, in which he lays down the law with peculiar accuracy and precision."

The case from 6 H. 7, 9, is thus stated by Brooke; Replevin, pl. 36: "A man takes my goods as a trespasser, I may have replevin, although the trespasser has property by the *tort*, for this is of the property which I had at the time of the caption; but I cannot have detinue, for that is of the property which is in me at the time of the action brought. (Per Brian.)"

The case from the Year Book, 7 H. 4, 28, b, is abridged by Brooke, tit. Replevin, pl. 15, where he says: "By some, replevin will not lie for beasts taken *contra pacem*; but, per Gascoigne, he may have replevin or trespass."

The case from 2 E. 4, 16, is thus abridged by Brooke, tit. Replevin, pl. 39: "per Danby; when a trespasser takes my goods, I may have replevin, for I may affirm the property in me, or I may have trespass, and disaffirm the property. Note. That

by him, where a man delivers his goods to W. N., and a stranger takes them, yet the bailor may give them to another, and the gift is good. Littleton, *contra*, for the property is in the stranger; and he said well, as it seems; and yet, that replevin lies, is good law, for this is of the property which was in him at the time of caption; but in the other case, the property was not in him at the time of the gift."

These cases are also cited by Rolle, in his Abridgment, tit. Replevin, B. 2, as good law. He also says, (tit. Replevin, c. 1,) "If the cattle of a man are manuring and agisting my land, *levant et couchant*, and are taken by strangers, I may have replevin. 42 E. 3, 18; 21 H. 8, 14, b; 11 H. 4, 17, and 2 E. 3, 44."

The case of *Leonard v. Stacy*, 6 Mod. 68, was replevin for goods, of which the plaintiff had been cheated.

It is admitted, on all hands, that "property in the defendant," or even "in a stranger," is a good plea. It follows, therefore, that when the property is taken by the defendant, from the possession of the plaintiff, under the claim of title, replevin is the proper action to try that title. But the plaintiff in replevin cannot be supposed to know, beforehand, what pretence the defendant may set up as an excuse for the taking; and whether that excuse be true or not cannot be known until the trial, so that it cannot be said, in any case where the taking of the plaintiff's goods has been from the possession of the plaintiff himself, that replevin will not lie. It is true, that in many such cases of taking, replevin cannot be maintained, because, upon the trial, it may turn out that the taking was lawful; but still, in those cases, replevin is the proper action to try the lawfulness of the taking, and the court will not quash the writ before that question is decided, unless the writ shall have been issued under such circumstances as to be a contempt of the court. Gilbert on Replevins, 161.

This happens when the improper interference of one of the parties in the cause obstructs the execution of the judgment of the court. In such a case, it is considered as a constructive contempt.

The general rule, then, is clearly established, that replevin will lie for every wrongful taking of the plaintiff's goods out of his possession.

But there is said to be an exception to this general rule, and that is, where the goods are in the custody of the law.

It may be well here to inquire, in what cases goods are said to be "in the custody of the law."

1. When cattle are justly seized for rent arrear, or for damage *feasant*, and impounded, but not before they are impounded.

Thus, Gilbert on Replevins, p. 61, 62, (edition 1757,) says, " 'Tis to be observed that there are two things complained of in this writ, viz., the taking and detention of the pledges, as the words of the writ express it, *quæ cepit et injuste detinet* ; but what is principally controverted in replevin is, whether the taking be just or not. For there are but two cases wherein a distress, justly taken, whether for rent or damage *feasant*, can be unlawfully detained. The first is, where the arrears of rent, or amends for the damage, are tendered to the party distraining ; and this tender must be made before the beasts are impounded ; for, when the beasts are in the custody of the law, the person distraining cannot be said unlawfully to detain what is in the custody of the law."

2. When goods are distrained for fines, or taxes, or by way of execution upon convictions before inferior tribunals, they are in the custody of the law ; as in *The King v. The Town Clerk of Guilford*, 8 Mod. 208 ; *Marriott v. Shaw*, Comyns's Rep. 274 ; and *Rex v. Monkhouse*, 2 Str. 1184, which were convictions under the game laws. *Winnard v. Foster*, 2 Lutw. 1191, where goods were taken by attachment, to enforce payment of the judgment of an inferior court. *Aylesbury v. Harney*, 3 Lev. 204, where a silver cup was seized, upon a condemnation by justices of the peace, under the excise acts, for the non-entry of strong waters. *Gins v. Dams*, 2 Lutw. 1179, where cattle were taken by a warrant of two justices, for a poor rate ; Clift's Entries, 636, for a militia fine ; Levinz's Entries, 152, on a conviction of fraud upon the excise ; *Lukin v. Eve*, Moore, 89, for amercement in a court leet ; Co. Ent. 570, b, 572, a, 573, a ; *Fletcher v. Ingram*, 5 Mod. 124 ; *Stephens v. Haughton*, 2 Str. 847 ; *Tott v. Ingram*, 1 Brownlow, 185, 189.

So, for breach of a by-law, *Winch. Ent.* 90 ; 3 Wils. 155.

So, for a poor-rate, *Milward v. Coffin*, 2 W. Bl. 1330.

So, for a judgment of commissioners of sewers, *Pritchard v. Stephens*, 6 T. R. 522.

These were all cases where the goods were clearly in the custody of the law, and yet there was no question that replevin would lie. In many of them the plaintiff recovered, and in all of them the causes appear to have been tried upon their merits, except the case of *Rex v. Monkhouse*, 2 Str. 1184, where the Court granted an attachment against the under-sheriff for granting a replevin for goods seized under a conviction, by an inferior tribunal, for deer-stealing. It is a very short note of a case, and it does not appear whether the replevin was quashed, nor whether the officer was punished for the contempt. But in a preceding case, *Rex v. Burchett*, 1 Str. 567, which was replevin for goods

taken upon a distress, under the game laws, the Court discharged the rule to show cause why an attachment should not issue against the officer who issued the replevin, and refused to set aside or quash the replevin. S. C. in 8 Mod. 208. The reason given for discharging the rule was, "that it was only a contempt to the inferior jurisdiction of the justices, and, in that case, the B. R. never interposes."

3. A third case, where goods are said to be in the custody of the law, is, where they have been seized in execution, upon a writ of *fiery facias*, or attachment issuing from a superior court.

In this case, it is admitted, on all hands, that the debtor himself will not be permitted to replevy them out of the hands of the officer; but this cannot be on the ground that the goods are in the custody of the law, for they are equally in the custody of the law when distrained and impounded for rent arrear, or for damage *feasant*, or for taxes, or for fines, or by way of execution of the judgments of inferior tribunals; and yet the books are full of cases of replevin for goods thus seized, and in custody of the law.

It is only upon the ground of constructive contempts of court, out of court, that the superior tribunals in England have restrained the issuing of a replevin, where the debtor, or any party to a suit in those tribunals, has attempted to obstruct the execution of their judgments.

Thus Gilbert (on Replevins, 161,) says, "If a superior jurisdiction award an execution, it seems that no replevin lies for the goods taken by the sheriff by virtue of the execution, and if any person should pretend to take out a replevin and execute it, the court of justice would commit them for a contempt of their jurisdiction, because, by every execution the goods are in the custody of the law, and the law ought to guard them; and it would be troubling the execution awarded, if the party on whom the money was to be levied, should fetch back the goods by a replevin; and therefore they construe such endeavors to be a contempt of their jurisdiction, and, upon that account, commit the offender. But if any inferior jurisdiction issues an execution, a replevin will lie for the goods taken by that execution; because the inferior jurisdiction, being restrained within particular limits, the officer who took the goods is obliged to show that he took the goods within those limits; and that the inferior court, which issued the execution, did not exceed their authority in issuing it.

"Besides, an inferior court cannot commit for contempt out of the court; and hence it is that the officer of an inferior court is to show by what authority he took the goods.

"Thus, in a replevin the defendant was put to justify by a condemnation before a justice of peace for not entering of strong

waters; and a warrant, on that, for levying 20s. fine on the plaintiff." *Aylesbury v. Harvey*, 3 Levinz, 204.

The distinction here taken, between the proceedings of courts of superior and inferior jurisdiction, is very just, because every thing is presumed to be within the cognizance of a court of superior jurisdiction which is not clearly shown to be out of it; and nothing is presumed to be within the cognizance of the inferior tribunal unless clearly shown to be within it. Hence, *primâ facie* the proceedings of a court of general jurisdiction are right; but those of a court of limited jurisdiction are wrong unless every thing appears upon the face of the proceedings which is necessary to give jurisdiction to the tribunal. Therefore, as the debtor is not bound to admit more than appears on the face of an execution issuing from a court of limited jurisdiction, and as such executions do not, on their face, show all that is necessary to support the jurisdiction, he is permitted to put the officer or the creditor upon the proof of that jurisdiction; and the means afforded him is a writ of replevin, to try the lawfulness of the distress, or of the caption of the goods.

It is true that the judgment and the execution of an inferior or limited tribunal, are as valid, in all matters within its jurisdiction, as those of a court of general jurisdiction; but the question, of jurisdiction of an inferior tribunal, is always open; and he cannot be "construed" to be guilty of a contempt, who only takes the usual legal means of trying the lawfulness of that seizure of his goods which has been made under the process of a court of doubtful jurisdiction.

It is only where the issuing or the service of the writ of replevin can be punished as a contempt of the court from which the execution issued, that the books show that replevin will not lie for goods taken in execution. The books, however, are incorrect in saying that in such cases replevin will not lie. They only mean to say that the party serving the writ will be liable to attachment for his contempt in obstructing the execution of the judgment of the court, and that the court will, perhaps, quash the writ which is the means of that obstruction.

The additional reason, therefore, given by Gilbert, is a sound one, why the rule is only applicable to goods taken by execution from the superior courts; to wit, that they only can punish for constructive contempts out of court. The ideas of Gilbert upon this point are strongly supported by Chief Baron Eyre, in giving his opinion in the case of *Cawthorne v. Campbell*, cited in Anstruther's Reports, p. 206, 212. The question was upon the authority of the Court of Exchequer to remove into that court, from another court an action of trespass brought against the commissioners of excise.

The Chief Baron placed the authority to remove the cause upon the ground of the action being a contempt of the prerogative of the king in relation to his revenue; and, in p. 212, speaking of a case decided in the time of Henry the 7th, he says, "In this, they evidently proceeded upon a general analogy to the proceedings in other courts; for there is no court that suffers its process, either to be insulted, or to be materially interrupted; and whenever this is attempted, it is a contempt, upon which the court proceed to grant attachments in the first instance." "But that this jurisdiction is not a very novel thing, nor this a single instance, we may collect from other cases that are very clearly established; namely, that if a man, at this day, there being a seizure in order to condemnation, was to presume to replevy the goods, it would be a contempt of the court for which an attachment would be granted instantly."

"So if a distress is taken for a fee-farm rent, or other duty to the crown, it is considered a contempt to replevy; and an attachment will issue upon it, as appears by the case of *The King v. Oliver*, in Bunbury, 14." "Originally, therefore, it seems to me, that to call into question, or in any manner to interrupt the course of the prerogative jurisdiction, was treated as a contempt of the process of the court, and proceeded against immediately as such."

The only cases cited in support of the rule, that goods taken in execution cannot be replevied, are cases of contempt; unless the loose dictum of Bacon in his Abridgment, tit. Replevin, C. respecting *Bradshaw's case*, and the dictum of Mr. Justice Powell, there referred to, can be called cases, when none of the facts of the cases are stated, nor any book referred to in which they can be found. Bacon says, upon his own authority, that "it was ruled, in the case of one Bradshaw, (T. 12, W. 3, in C. B.) that when an act of Parliament orders a distress and sale of goods, this is in the nature of an execution, and replevin does not lie; but if the sheriff grants one, yet it is not such a contempt as to grant an attachment against him. And Powell, Justice, said, he remembered a case in the exchequer, where a distress was taken for a fee-farm rent due to the king, yet, upon debate in the court, no attachment was granted, though it was the king's case."

In these cases there was neither an actual nor a constructive contempt of the authority of any court; for the first case supposes a distress and sale under an act of Parliament; and the other was a distress for rent; when, therefore, it is said, that in such cases replevin will not lie, I understand the expression to mean no more than that replevin cannot be maintained.

Thus, it is said generally, that replevin lies only for a wrongful

taking ; meaning that it can be maintained in such case only ; not that it will not lie to try the question whether wrongful or not.

In the note in the new edition of Bacon's Abridgment, (Phila. 1811, vol. 6, p. 56,) it is said, " A replevin does not lie for goods seized by warrant of a justice of the peace upon a conviction for destruction of the game, &c. Semb. 2 Mod. Ca. 208, 209." This reference is, no doubt, to the case of *The King v. The Town-Clerk of Guilford*, reported in 1 Mod. Ca. (8 Mod.) 208, 209, B. R. 10 Geo. 1724, which was this: " One Burchett was convicted by a justice of peace for keeping dogs, nets, and ferrets to catch conies, not being qualified, &c. And by a warrant from the said justice, his goods were distrained for the forfeiture ; and whilst they were in possession of the constable, and before they were sold, the town-clerk granted a replevin to take them from the constable. And now it was moved to set the replevin aside, because goods, thus taken by distress on such convictions, are irrepleviable ; and for an attachment against the town-clerk.

" The court would not set aside the replevin ; but made a rule to show cause why an attachment should not go."

This case appears again in Strange, 567, under the name of *Dominus Rex v. Burchett*, thus :

" The court ordered an attachment *nisi* against the town-clerk of Guilford, and a defendant convicted on the game act, for granting and issuing out a replevin for goods distrained for the penalty ; but on showing cause at the next term when Eyre, Justice, only was present, he discharged the rule, because it was only a contempt to the inferior jurisdiction of the justices, and, in that case, B. R. never interposes." This case, then, is a direct authority against the principle which it is cited to establish ; for the court both refused to quash the replevin and to issue an attachment of contempt for issuing it.

There is also in the same edition of Bacon's Abridgment, vol. 6, p. 56, this other note *a.* to the case of Bradshaw, there cited ; " But now, in such cases, it is considered as a contempt for a party to replevy ; and an attachment will issue upon it. *Rex v. Oliver*, Bunb. 14."

I have not seen Bunbury's report of that case ; but it is a case of a fee-farm rent due to the king, cited by Ch. Baron Eyre, in the case in Anstruthur, before mentioned. It was a prerogative case in the exchequer, and therefore gives no support to the rule respecting goods taken in execution from an inferior court ; except, that it shows that contempt, and not mere custody of the law, is the ground of the rule.

The note goes on further to say, that " replevin does not lie for goods distrained on a conviction for deer-stealing ; and if a

sheriff grants it, an attachment shall go against him. *Rex v. Monkhouse*, 2 Str. 1184." The whole case in *Strange* is in these words; "The court granted an attachment against the undersheriff of Cumberland for granting a replevin of goods distrained on a conviction for deer-stealing."

This is the whole case; and yet it seems to be the principal authority upon which all the books rely to support the principle, that goods taken under an execution from an inferior court cannot be replevied; although in many preceding cases of that kind, as we have before seen, replevin was maintained.

Mr. Durnford, in his note to the case of *Pearson v. Roberts*, in Willes' Rep. 672, in controverting the position of Chief Baron Gilbert, that replevin will lie for goods taken by an execution issued by an inferior jurisdiction, says, that "the two reasons given by Gilbert, by no means warrant it." "His first reason," says Mr. Durnford, "fails, if the officer took the goods within the limits of the particular jurisdiction, and if the inferior court did not exceed their authority in issuing the execution; in short, if it be a legal execution regularly executed."

Surely Mr. Durnford could not mean to say that this is a reason why replevin should not lie to try the question, whether the goods were taken within the limited jurisdiction, and whether the court did not exceed its jurisdiction in issuing the execution. If he did, it is a *petitio principii*. As well might he say, that for goods lawfully taken as a distress for rent replevin will not lie, in order to try the question, whether lawfully taken or not.

The question which Gilbert was discussing, was not whether replevin could be maintained for goods lawfully taken in execution, but whether it will lie for goods taken in execution, whether lawfully or unlawfully; that is, whether the plaintiff will be permitted to commence that sort of action to try the lawfulness of the taking, and to get back his goods while that question shall be pending. Mr. Durnford's argument only goes to show, that the plaintiff would not be entitled to recover upon the trial, not that he might not commence the suit.

"And with regard to the second reason," Mr. Durnford says, "it does not follow, because an inferior court cannot commit for a contempt out of court, that therefore a replevin will lie; the want of authority to inflict one particular (and that an extraordinary) punishment for doing the thing, does not prove that the thing itself may be legally done."

Here is the begging of another principle; to wit, that the rule is not grounded, as Gilbert supposed, upon the doctrine of constructive contempts.

If the rule be grounded entirely upon that doctrine, then the

rule does not apply to those tribunals towards which there can be no constructive contempt.

Mr. Durnford observes, "The only authority cited by Gilbert in support of this opinion, is the case of *Aylesbury v. Harvey*, 3 Lev. 204, of which," he says, "it is sufficient to observe, 1st, that this question was neither agitated at the bar nor decided by the bench; and 2d, that the judgment of the court was against the plaintiff in replevin."

Now, it was because the question was not agitated nor decided by the bench, that Gilbert cited it as authority, that whenever the defendant in replevin justifies under the authority of a tribunal of limited jurisdiction, he must show that he took the goods within the limits, and that the inferior court did not exceed its jurisdiction; and that replevin will lie for goods taken under the authority of such a limited jurisdiction.

For it will be seen, by the pleadings in that case, which are given at full length in Levinz's Entries, 152, that the defendants had able counsel, and that their plea sets forth every particular necessary to give jurisdiction to the court, and to justify the caption of the goods; which particularity would have been unnecessary, if it were sufficient merely to show that the goods were taken under an execution issued by such a court.

That such a point should not have been suggested, either by the bar or the bench, is strong evidence that such was not then the law.

Mr. Durnford proceeds: — "But in opposition to this opinion," (of Gilbert) "may be placed Bradshaw's case, 6 Bac. Ab. 55; *Rex v. The Sheriff of Leicestershire*, 1 Barnard. B. R. 110; *Rex v. Monkhouse*, 2 Str. 1184; and *Rex v. Burchett*, Id. note 1."

The case of Bradshaw has been mentioned before, as being very loosely reported. It merely states, "that a distress and sale, under an act of Parliament, is in the nature of an execution, and replevin does not lie; yet the issuing of it is no contempt." The particular circumstances of the case, and the grounds of the decision are not stated, nor what effect the decision had upon the cause; whether to quash the writ, or to guide the jury in their verdict, or to arrest the judgment. So loose a case cannot be considered as entitled to any authority.

The next case arrayed against the Chief Baron, is *Rex v. The Sheriff of Leicestershire*, reported, as it is said, in 1 Barnardiston's Reports of Cases in B. R. 110. This case I have never seen. Mr. Durnford has not given us the substance of it; but it is sufficient to say, with Lord Kenyon, (1 East, 642,) "that Barnardiston was a bad reporter;" and with Lord Mansfield, (2 Burr. 1142,) that "it was marvellous to those who knew the Sergeant, and his manner of taking notes, that he should so often

stumble upon what was right; but yet that there was not one case in his book which was so throughout."

The next case, which is to put down the authority of Gilbert, is *Rex v. Monkhouse*, before mentioned, and reported in two lines and an half.

These, and the case of Burchett, said to be in a note to the case of *Rex v. Monkhouse*, in Str. 1184, but which is not in my edition, and which, no doubt, is the case which I have already cited from 8 Mod. 208, 209, and Strange, 567, constitute the whole array, in opposition to the deliberate opinion of Gilbert, in a well considered treatise upon the subject, supported by the large number of cases already cited, and many more, which I have omitted to notice, in which replevin has been maintained for goods taken by way of execution of the judgments of inferior tribunals.

Mr. Durnford, indeed, cites two cases which are against him, and endeavors to avoid their force.

The first is *Milward v. Coffin*, 2 W. Bl. 1330, which was replevin for goods taken under a warrant of distress, by two justices of the peace, for poor-rates. The defendant justified under the statutes of 43 Eliz. and 17 Geo. 2, as overseers of the poor; and judgment was rendered for the plaintiff.

Mr. Durnford supposes he evades the force of this case, by saying that the justices exceeded their authority; and that "the goods were not, in contemplation of law, taken under an execution."

But that could not be ascertained until the trial; and it was to try that very question that the writ was issued and held to lie. If the justices had jurisdiction, the goods were taken under an execution; if they had not jurisdiction, they were not. This was the very point tried in the cause, and to try which the writ was issued; so that replevin will lie, whether the justices have jurisdiction or not, because it must lie before that question can be decided.

The other case cited by Mr. Durnford is *Pritchard v. Stephens*, 6 T. R. 532, which was a rule to show cause why a replevin for goods taken under a warrant of distress, granted by commissioners of sewers, should not be quashed.

The counsel in support of the rule, contended that the goods in question could not be replevied at all, and cited the following passage from Callis, 200, (a book which I have never seen;) "If, upon a judgment given in the King's Court, or upon a decree made in this Court of Sewers, a writ or warrant of *distringas ad reparationem*, or of that nature, be awarded, and the party's goods be thereby taken, these goods ought not to be delivered by

replevin, to be taken either out of this court, or out of any other court of the king; because it is an execution out of a judgment." And the counsel stated, that Callis, in p. 197, takes a distinction between those goods that remain in the custody of the officer under the seizure, and those that afterwards come into the hands of a purchaser, saying that the former are not replevisable; and that Callis also, in p. 195, in distinguishing inferior from superior courts, says of the former, "a replevin doth not lie, and ought not to be granted from the sheriff, or any of his deputies, for that the Sewer is a judicial court of record, and of greater authority than the power of the sheriff, which, in these cases, is but ministerial."

The counsel, on the other side, said, "It is not necessary to controvert the opinions of Callis, which have been relied on by the defendant; (though it might be shown, if necessary, that those opinions are not tenable,) because no judgment was in fact given by the commissioners of sewers." The court said, that, "at all events, this was a reason why they ought not to interfere in this summary way, by quashing the proceedings, but should leave it to the defendant to put his objection on record in a formal manner; and in the course of the argument, Lord Kenyon, C. J., expressed very strong doubts respecting the opinions cited from Callis."

The rule was discharged, and we have heard no more of the cause.

These opinions of Callis, respecting which Lord Kenyon expressed such strong doubts, are the very opinions which Mr. Durnford attempts to support, in his note to the case of *Pearson v. Roberts*.

But it is not true, as Mr. Durnford alleged, that the only authority cited by Gilbert was the case of *Aylesbury v. Harvey*. He cited also the case of *Winnard v. Foster*, Lutwyche, 1191; Rastell's Entries, 275, (probably a misprint for 553;) Bro. Ab. Replevin, pl. 22; 38 Eliz. 3, 3; Lev. Ent. 152, all strongly supporting his opinion.

The case of *Winnard v. Foster*, Lutw. 1191, was replevin for a cow, a stack of hay, and a pike of hay. The defendant made cognizance as bailiff of the sheriff, and set forth, in his cognizance, that the cow and hay were in the possession of one Nathaniel Day. That one William Dawson, at a county court of the said county, produced a writ of *justicies* to the sheriff, by which he was commanded to *justice* the said Nathaniel Day that he render to the said William Dawson £14, which he owed him, &c., &c., stating, in a minute manner, all the proceedings in the county court; the levying the plaint; the summons delivered to the

bailiff, and his return; the failure of Day to appear; the order for attachment by his goods, and the service thereof upon the goods in question as the goods of the said Nathaniel Day.

The plaintiff replied, that, at the time of the caption, he was in possession of the cow and hay as of his own goods and chattels, and denied that Nathaniel Day was possessed of them as his goods and chattels at the time of caption; upon which traverse the issue was joined; and the jury found the issue for the defendant as to the cow, and for the plaintiff as to the hay; and the plaintiff had judgment for the damages and costs as to the hay, and the defendant had judgment for the return of the cow, and for his costs.

This case shows that replevin will lie for goods taken by attachment from an inferior court; and that it was supposed, at least by the defendant's counsel, necessary to set out, in the plea, minutely, all the circumstances which gave jurisdiction to the court under whose process the defendant justified the caption.

The ancient forms of entries and pleadings are evidence of the law.

Gilbert referred to Rastell's Entries, although the page 275, cited, is evidently a mistake, yet in folio 553, we find the form of an avowry for an amercement, or fine in the *lete, hundred, or torn*, in which every thing necessary to show the jurisdiction is minutely set forth with all the circumstances of time, place, &c.

He also referred to Levinz's Entries, 152, which contains the pleadings at large in the case of *Aylsbury v. Harvey*, cited by him from 3 Levinz, 204.

He also referred to Bro. Ab., Tit. Replevin, pl. 22, which contains an abridgment of the Year Book, 28 Eliz. 3, 3, in these words, (translated,) "Replevin: the defendant avowed for this, that he had recovered 33s. in the Court Baron, by plaint there, and these beasts were delivered to him in execution of the judgment, and issue taken that they were not delivered to him in execution."

These authorities, cited by Gilbert, are, to my mind, much more satisfactory in favor of his opinion than those cited by Mr. Durnford are against it.

It seems to me, very clearly, that the rule contended for, (to the extent to which it has been actually carried by adjudged cases.) is not founded upon the fact alone that the goods are in the custody of the law; but upon the right and duty of the court to enforce its judgment against the parties to the suit, and upon its power to punish, as for a contempt, any endeavor, by a party, to obstruct or defeat the execution.

And I find my opinion strongly corroborated by that of the

celebrated Maryland lawyer, Daniel Dulany, in the case, already alluded to, of *Coursey v. Wright*, in 1 Har. & M'Henry, 394. The question, which he was discussing, was, whether Thomas Coursey could have brought replevin against T. Wright, while he, T. Wright, had possession of the property under his replevin against John Coursey. Mr. Dulany said, "I have little doubt but he might." "The transaction being *inter alios*, as it cannot affect the right, so neither can it affect the remedy, which is inseparable from the right. The cases in 8 Mod., Gilbert and Strange, proceed on a peculiar principle. When goods belonging to a defendant are taken in execution on *feri facias*, or by distress on conviction, they being in the custody of an officer, acting under the mandate of authority, are in the custody of the law for the very purpose that justice may be done; but if the replevin, by the defendant, were allowable, the views of justice might be disappointed, and the very object of the judgment destroyed; but if the property of a stranger should be taken, it would be a wrong, and consequently the thing taken would not be in custody of the law. In the first instance it would be incongruous for the law to allow a process to defeat its ends; but in the second, very agreeable to its principles that a man should not suffer an injury from the act of a stranger. Execution authorizes the officer only to make, or levy the debt or penalty, out of the chattels of the defendant; but in taking, for the purpose, the chattels of another person, he acts without authority. If the sheriff, on a *fi. fa.* against the effects of A, takes and sells the goods of B, the owner may sue him. 1 Burr. 31. In replevin, the plaintiff shows the cattle of a stranger for the cattle of J. D. and the officer takes them, he is a trespasser. 2 Roll. Ab. Tit. Replevin, 431."

"In case of distress for rent arrear, the goods, from the first taking, are in the custody of the law, and not merely in the distrainer, 3 Bl. 146; but their being in this custody does not prevent the suit by replevin; on the contrary, the suit is most proper in the very instance. When replevin is brought, the defendant may defend his possession, if he has property, by the writ *de proprietate probanda*. As he has the means to secure his possession, and as if the plaintiff in replevin should fail, the defendant may be entitled to a *retorno habendo*, it might be reasonable, (as full justice might be obtained without it,) to say that the defendant in replevin should not, during the pendency of the suit, bring replevin on his part, as it would tend to infiniteness. But the case of a stranger is very different. He cannot make himself party to the suit; entitle himself to the writ *de proprietate probanda*, 2 Roll. Ab. 431, or to a return, in any event of the suit. Not being provided for, or having the means of security afforded

him on the suit, he consequently has a remedy by action against the possessor ; for there cannot be an irremediable right ; and it would shock the first principles of justice to allow that what A. B. may do shall deprive C. of his right. The true legal ground of replevin is the unjust taking and detaining of personal property ; and of the remedy, that the owner may be specifically restored to it, and compensated for the injury from the unjust detention."

"A denial of justice is injustice ; suspension is deprivation for the time. Injury is not denominated from its degree."

In Maryland, the opinions of Mr. Dulany, when deliberately given, have ranked almost, if not quite as high in the scale of authority, as cases adjudged in the highest tribunals of the State during his time. That which I have cited recommends itself to every reflecting mind by its sound sense combined with its sound law.

In the present case it is not necessary to decide whether replevin will lie for goods taken in execution issued by a court of limited or inferior jurisdiction, because the execution against Wells was from this Court, which is a court of general jurisdiction.

It became important, however, to investigate that doctrine, with a view to ascertain the ground upon which the rule rests, that goods taken in execution cannot be replevied, and the extent of that rule. It is with that view only that the note of Mr. Durnford has been so minutely examined.

With regard to the extent of the rule, I have found no adjudged case, except that of *Cromwell v. Owens*, 7 Har. & Johns. Rep. 55, in which the rule has been extended to a third person, whose goods have been taken out of his actual or constructive possession, to satisfy the debt of another person.

All the cases of replevin cited in support of the rule, are cases in which the debtor himself was plaintiff in replevin.

Such was *Pearson v. Roberts*, Willes' Rep. 672 ; *Milward v. Caffin*, 2 W. Bl. 1330, cited in *Pearson v. Roberts*, and all the cases cited in Mr. Durnford's note to that case, namely, *Aylesbury v. Harvey*, 3 Lev. 204 ; *Bradshaw's case*, Bac. Ab., Replevin, c. ; *Rex v. Sheriff of Leicestershire*, 1 Barnard. B. R. 110 ; *Rex v. Monkhouse*, 2 Str. 1184 ; *Rex v. Burchett*, *ib.* note 1, and *Pritchard v. Stephens*, 6 T. R. 522.

So also were the other cases of replevin cited by the defendant's counsel in the case of *Cromwell v. Owens*, except the case of *Ladd v. North*, 2 Mass. Rep. 514, which was replevin by a third person ; but no question was made whether it would lie. The case of *Thompson v. Button*, 14 Johns. 84, is decidedly against the rule in the extent contended for ; because the replevin was sustained and judgment rendered for the plaintiff. But there the

plaintiff was not the debtor in the execution, and the goods were taken out of the possession of the plaintiff. The case of *Eaton v. Southby*, Willes, 136, was a replevin by the vendee of the sheriff for corn sold under an execution against a former tenant, and distrained by the landlord for arrears of rent due from a subsequent tenant, the corn having been sold before it was reaped, and distrained after it was cut, and before it was fit, in the course of husbandry, to be carried away by the vendee.

The question was, whether the corn could be distrained under those circumstances; and the court was of opinion that it could not, even if it had not been taken in execution, because the former tenant, being tenant at will, and his tenancy determined by his death, he had a right to keep the corn on the ground until, in the usual course of husbandry, it was fit to be carried away. The only part of that case applicable to the present, is the dictum, "that goods taken in execution, or distrained for damage feasant, are in the custody and under the protection of the law, and therefore cannot be distrained for rent," which dictum, in regard to goods taken in execution, is not supported by the reference to Co. Lit. 47 a.

The case of *Alexander v. Mahon*, 11 Johns. 185, cited in *Cromwell v. Owens*, was an action of trover, and was probably cited for a similar dictum, that goods, seized under execution, are in the custody of the law, and therefore not distrainable; and for the reason assigned. "For it is repugnant, *ex vi termini*, that it should be lawful to take the goods out of the custody of the law."

In that case the goods were lawfully taken in execution, and therefore were in the custody of the law; but it would be equally repugnant, *ex vi termini*, to say that goods unlawfully taken and detained, were in the custody of the law.

The case of *Palgrave v. Windham*, 1 Str. 212, was an action upon the case by a landlord against the officer who took the tenant's goods in execution, and removed them from the premises without paying one year's rent to the landlord; and I do not find in it any point or dictum applicable to the case of *Cromwell v. Owens*, in which it was cited.

The case of *Buxton v. Home*, 1 Shower, 174, was debt upon a judgment. The defendant pleaded that he was taken in execution and permitted to escape with the consent of the plaintiff, which plea was adjudged bad on demurrer. There seems to be nothing in that case applicable to the case in which it was cited, or to the present.

The next case cited in *Cromwell v. Owens*, is *Farr v. Newman*, 4 T. R. 640, 651. The question, in that case, was, whether the sheriff, upon a *feri facias* against the executor, for his own proper

debt, could make the money out of the goods of the testator in the hands of the executor to be administered; and so force him to a *devastavit*, after notice by a creditor of the testator that he had judgment against the executor, *de bonis testatoris*, and an execution which he was about to levy on the same goods. It was an action upon the case against the sheriff for a false return of *nulla bona testatoris* upon that execution. The judgment of the court, (Buller, J., dissenting,) was for the plaintiff. The page 640, referred to in *Cromwell v. Owens*, contains a part of Mr. Justice Buller's argument against the opinion of the court; and probably the following passage was cited: "How is the sheriff to try any one of these questions? It should be enough to him that the goods are in the possession of the debtor, and used by him as his own. When the plaintiff's execution came to the sheriff's hands they could not take these goods under it. The writ commanded the sheriffs to levy the debt of the goods and chattels of the testator in the hands of Reid and wife to be administered. These goods were not then in their hands, but they were in the hands of the sheriff, and in *custodiâ legis*; and in Holt, 643, and 1 Shower, 174, it was resolved by Holt, C. J., that goods being once seized and in custody of the law, could not be seized again by the same or any other sheriffs." "So the sheriff cannot take goods which have been distrained, *Tulley et al. v. Peachey*, Hill, 23; Geo. 3."

But to this Lord Kenyon, C. J., answered, in p. 651, "As to the expression cited from Shower to show that goods once seized cannot be seized again, it must mean, when they are legally seized; for if any thing happen to disaffirm the first seizure, and to show that it was not legal, it is considered as no seizure in law; and the word seizure is, in such a case, misapplied."

The case of *Turner v. Fendall*, cited from 1 Cranch, 117, does not seem to have any bearing upon the case. Nor do the other cases of *Ball v. Ryers*, 3 Caines's Rep. 84, and *Sturtevant v. Ballard*, 9 Johns. 337.

The case of *Ilsey v. Stubbs*, 5 Mass. Rep. 280, was replevin against a defendant who had obtained possession of the goods by replevin against a third person. The defendant pleaded that fact, and that his suit against the stranger was still pending. This plea was adjudged bad on demurrer. If there was any thing in that case applicable to the case of *Cromwell v. Owens*, it was against the party who cited it; for the judgment was in favor of the plaintiff in replevin against the defendant, who claimed protection under the rule, that the goods were in custody of the law, they having been delivered to him by replevin, and he having given bond to return them in case it should so be adjudged. But it is probable

that it was cited for the dictum of C. J. Parsons, that "replevin lies for him, who has the general or special property in chattels, against him who has wrongfully taken them; but chattels, in the custody of the law, cannot, at common law, be replevied; as goods taken by distress upon a conviction before a justice, or goods taken in execution."

"But if the goods are wrongfully taken by virtue of legal process, the remedy of the owner was by action of trespass or trover against the officer. For the common law would not grant process to take, from an officer, chattels which he had taken by legal process already issued; but the common law has, in this respect, been altered by the statute of 1789, c. 26, § 4. This statute authorizes the suing of a replevin against the officer for chattels which he has attached, or seized in execution, provided the plaintiff in replevin be not the debtor. This alteration of the common law has been productive of much practical inconvenience, but it must rest with the wisdom of the legislature to decide whether the common law, in this respect, should or should not be restored.

"As a general principle, the owner of a chattel may take it, by replevin, from any person whose possession is unlawful; unless it is the custody of the law; or unless it has been taken by replevin from him, by the party in possession."

All this is mere dictum, not at all necessary to the decision of the question before the Court.

It has already been shown that goods, in the custody of the law, may be replevied; as in the case of goods distrained and impounded for rent, or damage-feasant, or for poor-rates, or for fines upon convictions before justices of the peace, and other inferior tribunals; and that in every case where it has been adjudged that goods taken in execution could not be replevied, the debtor himself was the plaintiff in replevin.

But the Chief Justice, (for whom while living I had the highest respect, and whose memory I revere,) proceeded to say, "If goods are wrongfully taken by virtue of legal process, the remedy of the owner was by action of trespass or trover against the officer."

No goods can be taken by virtue of process which does not authorize the taking of them; nor can the process authorize a wrongful taking. *Beverly v. Lambert*, 1 Wash. 308, 310, 312. If then the goods were wrongfully taken, they could not be taken by virtue of the process. The execution only authorizes the officer to take the goods of the debtor. If he take the goods of a stranger, he may take them under color of the execution, but not by virtue of the execution. If he took them by virtue of the execution he would not be a trespasser, which the Chief Justice admits he would be.

Again, the Chief Justice says, "For the common law would not grant process to take from an officer, chattels which he had taken by legal process already issued."

If the word "by" means "by authority of," then the taking by the officer was rightful; and if so, the proposition is correct as a proposition; but not as a reason why the owner of goods, wrongfully taken by the officer, should be confined to his action of trespass or trover.

The Chief Justice further states that the common law in that respect was altered by the statute of Massachusetts which authorizes the suing of a writ of replevin against the officer for chattels seized by him in execution, provided the plaintiff in replevin be not the debtor.

Of the correctness of that proposition I doubt.

1. Because it was never a rule of the common law, that goods, in the custody of the law, could not, for that reason alone, be replevied; as has been already shown.

2. Because no adjudged case has been found in the English books in which it has been decided, that a stranger to the execution could not maintain replevin against the sheriff for wrongfully taking his goods for the debt of another.

3. Because, at the time of the passing of the first colonial statute of Massachusetts, in 1641, the law was well settled in England, that, in many instances, where goods were in the custody of the law, they might be replevied; as in case of goods distrained and impounded, either with or without good cause. Co. Lit. 47 *b*. Goods distrained for an amercement in a court-leet. *Lukin v. Eve*, Moore, 88, 10 Eliz. An. 1567; *Joyner v. Skippe*, Co. Ent. 570 *b*; Pasc. 36, Eliz. An. 1593, in *communi Banco*, Rotulo, 1260. And Lord Coke, in his preface, says, "That for thy further satisfaction, learned reader, every precedent hath a true reference to the court, yeare, term, number, roll, and record where the precedent is to be found." And Ashhurst, J., in *Farr v. Newman*, 4 T. R. 648, says that the form of proceedings and judgment "is of greater authority than even adjudged cases; because the writs and records form the law of the land." So in *Kingston v. Bayly*, Co. Ent. 572 *a*, Trin. 30 Eliz. Rot. 1012, C. B. Anno 1588; *Hasell v. Wilkes*, Co. Ent. 573 *a*, Mich. 8 Jac. Rot. 2119, Anno 1610; *Godfrey's case*, 11 Co. 43, Mich. 12 Jac. Anno 1614; *Freeman v. The Abbot of Ramsay*, cited in 11 Co. 43 *a*, from the Year Book 10 E. 3, fol. 9 and 10, Anno 1336; *Griesley's case*, 8 Co. 38, Trin. 30, Eliz. Anno 1588; *Potter v. Gray*, Cro. Eliz. 245, Mich. 33, 34, Eliz. Anno 1591; *Tott v. Ingram*, 1 Brownlow, 185, 4 Jac. Anno 1606; *Godfrey v. Bullein*, 1 Brownlow, 189, 8 Jack. Anno 1610; *Aylesbury v.*

Harvey, 3 Lev. 204; Lev. Ent. 152, S. C. 36, Car. 2, Anno 1684, for goods taken upon a conviction under the excise acts. *Winnard v. Foster*, 2 Lutwyche, 1190, Trin. 3 Wand. M. Anno 1691, for goods attached for a debt in the county court. *Gins v. Dams*, 2 Lutwyche, 1179, Hill. 9, W. 3, Anno 1697, for goods taken under a warrant of two justices of the peace for non-payment of a poor-rate. *Fletcher v. Ingram*, 5 Mod. 127, Trin. 7 W. 3, Anno 1695, for an amendment by a court-leet, for not serving as constable. Clift's Ent. 636, for goods taken by distress for a militia fine. And even as late as 4 Cro. 1, Anno 1718, in the case of *Marriatt v. Shaw*, Comyns' Rep. 274, replevin was maintained for goods taken for a fine upon a conviction by a justice of the peace under the game acts.

All these were cases of replevin for goods in the custody of the law, and yet no question was made whether replevin would lie, although brought by the debtors themselves. These cases, (and many more might be cited,) extend from the Year Book of Edward the 3d, in 1336, to 4 Geo. 1, in 1718, more than three and a half centuries.

The first case, which I find, in which the question was started whether replevin would lie in such cases, is that of Bradshaw, mentioned in Bac. Ab., Replevin, C. as having been decided Trin. 12 W. 3, in C. B., where "it was ruled, that when an act of Parliament orders a distress and sale of goods, this is in nature of an execution, and replevin does not lie; but if the sheriff grant one, yet it is not such a contempt as to grant an attachment against him."

But, as before observed, it does not appear whether the court quashed the replevin, or whether judgment was given upon demurrer to the avowry, or whether it was an instruction to the jury upon the trial. At all events it was a rule applicable only to one of the many cases in which goods may be in the custody of the law; and was a case in which the debtor was plaintiff in replevin. This case, however, was ruled in the year 1700. The first statute of Massachusetts on the subject of replevin, was passed in 1641; and as the law then was that replevin would lie in cases of distress by way of execution of the judgments of inferior tribunals, the statute of Massachusetts of 1641 was rather in restraint of the common law, than in enlargement of it, when it authorized replevin in all cases of "cattle or goods impounded, distrained, seized, or extended, unless it be upon execution after judgment, or in payment of fines."

The Act of 1720, which excepts distress made by a proper officer for any tax, fine, or forfeiture, was but an affirmation, in that particular, of the statute of 1641.

Whether the statute of 1641 was construed, by the courts, to except the case of goods of a stranger taken in execution, does not appear. From the words of the act itself, it would seem to be the most natural construction to confine the exception to goods of the debtor, taken on execution; because it says, "after judgment." Against whom? The most obvious answer is, against the plaintiff in replevin.

The 4th section of the Act of 1789, c. 26, seems to corroborate this construction, for it takes for granted the right of the third person to replevy his goods wrongfully seized by the officer, and only regulates the manner and process, and designates the tribunal by which it shall be done. It says, "that when any goods or chattels shall be taken, distrained, or attached, which shall be claimed by a third person, and the person, thus claiming the same, shall think proper to replevy them," he may sue replevin from the common pleas, in the county where taken, distrained, or attached, and in a form prescribed in the act. 5 Dane, Ab. 517, 519.

For these reasons, with great deference to the profound learning of the late Chief Justice of Massachusetts, I must doubt whether the statute of 1789, c. 26, § 4, altered the common law, in regard to the goods of a third person wrongfully taken in execution.

It may, perhaps, be said that no such case is to be found in the English books, in which replevin has been maintained against the sheriff; and that, if "laid, as per schedule, and replevied," was a good return to a *fiery facias*, it would be found in the "Retorna Brevium." One answer, however, will serve for both those objections.

In England, under the statute of Marlbridge, (53 H. 3, c. 21,) the application for a replevin is to be made to the sheriff himself, who has the goods in his possession, under the *fiery facias*, and who, if a third person claims the property, has the power of summoning a jury of inquest to inquire to whom the property belongs. (Dalton, 146; Gilbert on Execution, 21, cited in *Farr v. Newman*, 4 T. R. 633.) If, upon that inquest, it be found for the third person, the sheriff will restore it to him, and be justified in his return of *nulla bona* upon the *fiery facias*, so that the whole purpose of replevin is thereby answered. If the jury should find that it is the property of the debtor, he may go on to sell it, and the finding will mitigate damages, in an action of trespass, if the goods seized should happen not to be the defendant's. *Farr v. Newman*, 4 T. R. 633.

But, in this county, it has not been the practice of the marshal to summon a jury to try the question of property; if he has any doubt, he may require a bond of indemnity from the plaintiff. If

the marshal here has no power to summon a jury to inquire of the property, justice seems to require that the owner should have his writ of replevin, if there be no positive rule of law to the contrary.

I have examined the dictum of the chief justice, in the case of *Ilseley v. Stubbs*, with the more minuteness, because it seems to be relied upon by the Court of Appeals in Maryland, as the main support of the dictum, in the case of *Cromwell v. Owens*, "that, in no case whatsoever, will replevin lie against an officer, for goods taken in execution under lawful process."

This proposition extends to the case of a stranger's goods wrongfully taken out of the possession of the stranger himself, by an officer, to satisfy the execution against the debtor.

The case of *Cromwell v. Owens* was that of a stranger's goods taken out of the possession of the debtor, and that was the only case decided. The general proposition, so broadly laid down by the court, was mere dictum. It is not authority, further than it was applicable to the case then before the court.

That very respectable tribunal has taken the proposition to be universally true, that goods, in the custody of the law, cannot be replevied; and that goods, wrongfully taken by an officer of the law, under color of lawful process, are in the custody of the law, although the officer, in taking them, was guilty of a trespass, and although he is liable for damages for every moment that he detains them in that supposed custody of the law. This would, indeed, be an incongruity. There cannot be a wrongful custody of law.

When goods are seized in the possession of the debtor, it may well be doubted whether replevin can be maintained; yet there does not seem to be any reason why it should not lie, (that is, be sued out,) to try the question of possession, at the time of the caption, as well as of title to the property. The possession may be equivocal, as in the case of *Clarke v. Skinner*, 20 Johns. 465, where actual possession was in the debtor, but the right of possession was in the third person, the owner, the plaintiff in replevin.

So, in *Thompson v. Button*, 14 Johns. 84, the goods were supposed by the court, to have been taken out of the possession of the plaintiff in replevin, and not of the debtor; and the court intimated a strong opinion, that if they had been taken out of the possession of the debtor, the replevin could not have been maintained.

In the case of *Clarke v. Skinner*, 20 Johns. 465, Mr. Justice Platt, who seems to have considered the case well, and who gave the reasons of his opinion very fully, said:

"I am of opinion that replevin lies in favor of any person whose goods are taken by a trespasser. As to John Clarke, (the

debtor,) the goods were in the custody of the law, and therefore irreplevisable; but, in my judgment, the law does not deny the remedy, by replevin, to any person whose goods are taken from his actual or constructive possession, by a wrongdoer." "The rule, I believe, is without exception, that wherever trespass will lie, the injured party may maintain replevin." "Baron Comyns says, replevin lies of all goods and chattels unlawfully taken; (Com. Dig. Replevin, A.); though (Replevin, D.) he says replevin will not lie for goods taken in execution." "This last proposition is certainly not true without important qualifications. It is untrue as to goods 'taken in execution,' when the *fieri facias* is against A., and the goods are taken from the possession of B. By 'goods taken in execution,' I understand, goods rightfully taken, in obedience to the writ; but, if through design or mistake, the officer takes goods which are not the property of the defendant in the execution, he is a trespasser, and such goods never were taken in execution, in the true sense of the rule laid down by Baron Comyns." "By constructive possession, I mean a right to reduce the chattel to immediate possession."

And in page 470, he says: "The general rule is that the plaintiff must have a general or special property in him at the time of the unlawful taking, of which he complains; that is, he must either have the actual possession, or the right of reducing it to his actual possession, at the time of the tortious taking.

"If goods be taken on a *fieri facias*, as the property of the defendant named in the execution, and the writ is from a court of competent jurisdiction, and not void from any defect on its face, the officer, as against such defendant, is never a trespasser nor a wrong-doer. As to such defendant, the property is in the custody of the law, and he is precluded by the judgment against him." "But such reasoning has no application to the rights of a stranger whose property has been wrongfully taken on an execution against another person."

"In every adjudged case that I have found, where it was held that goods 'taken in execution,' or goods 'in the custody of the law,' could not be replevied, that doctrine has been applied to cases where the defendant in the execution was plaintiff in the replevin."

In the case of *Mulholm v. Cheney*, (Addison, 301,) the president of the court of common pleas in Pennsylvania, expressed the same opinion.

In the above case of *Clarke v. Skinner*, Spencer, C. J., and Woodworth, J., concurred with Mr. Justice Platt, but they rested their decision solely on the ground that the goods were to be

deemed as taken from the actual possession of the plaintiff in replevin, who was not the defendant in the execution.

The general rule, as before observed, is, that replevin will lie wherever trespass will lie for taking the plaintiff's goods.

The facts necessary to maintain the suit, are, property in the plaintiff, either general or special, and a wrongful taking of the goods out of the plaintiff's possession, either actual or constructive. The possession must be such as would maintain trespass. If the original taking be lawful, or if the possession never was in the plaintiff, an unjust detention alone will not maintain replevin, (*Gardner v. Campbell*, 15 Johns. 401; 2 Wheat. Selwyn, 896,) unless attended by some act which would make the defendant a trespasser *ab initio*. *Meany v. Head*, 1 Mason, 322; 4 Bac. Ab. Replevin, F.

I am aware of the cases of *Badger v. Phinney*, 15 Mass. Rep. 359, and *Baker v. Fales*, 16 Id. 147, but am not satisfied that they can be supported upon principles of common law, however correct they may be, under the statutes of Massachusetts.

"The whole personal property is liable to execution, except wearing apparel." "But the absolute property of those goods must be in the debtor; and therefore, if the sheriff takes the goods of a stranger, though the plaintiff assures him they are the defendant's, he is a trespasser, for he is obliged, at his peril, to take notice whose the goods are; and, for that purpose, may impanel a jury to inquire in whom the property of the goods is vested; and this, it is said, shall excuse him in an action of trespass. 2 Bac. Ab. C. 4; Keilway, 119, 120; Bro. tit. Trespass, 99; Dalt. Sheriff, 146; Bro. tit. Pledges, 28; Dyer, 67 b, in margin.

When no other person has the right of possession, the property draws after it the possession in law, and possession is implied in him who has the right of possession. *Gordon v. Harper*, 7 T. R. 12, 13; *Ward v. Macauley*, 4 Id. 489.

The books are full of authorities that trespass will lie against the officer who takes a stranger's goods in execution, either out of the actual or constructive possession of the plaintiff. *Hallett v. Byrt*, Carthew, 381, where Lord Holt says: "There is a difference between replevin and other process of law, with respect to the officers; for, in the first case, namely, in replevin, they are expressly commanded what to take, in specie; but, in writs of execution, the words are general, namely, to levy of the goods of the party, and therefore 'tis at their peril if they take another man's goods; for, in that case, an action of trespass will lie."

So, in the Year Book, 11 H. 4, 91, cited in 2 Rolle's Ab. 552, "If a bailiff of a court attach the party by the goods of another man, trespass lies against him, for he ought to take notice of the

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goods of the party." "So, if he attach the servant, by the goods of his master, being in possession of the servant. 11 H. 4, 90, (b.) 91, (b.) The law is the same, if the sheriff, upon an execution, takes the goods of a stranger." *Wale v. Hill*, 1 Bulstrode, 149; *Coote v. Lighworth*, Moore, 457; *Thurbane's case*, Hardres, 328; *Sanderson v. Baker*, 3 Wilson, 309; S. C. 2 W. Bl. 832; *Bloxam v. Olden*, 1 Burr. 26; *Cooper v. Chitty*, 1 Id. 30; Bro. Ab. Trespass, 135; 19 H. 6, 80; *Ackworth v. Kempe*, Doug. 40; *Cole v. Hindson*, 6 T. R. 234; *Shadgett v. Clipson*, 8 East, 328, and *Farr v. Newman*, 4 T. R. 633.

In the present case of *Williamson v. Ringgold*, the simple question submitted to the court is, whether the mere fact that the defendant took and detained the goods of the plaintiff, under color of an execution against Wells, is sufficient ground to justify the court in quashing the replevin.

The court must suppose the strongest case against the defendant, namely, that he took the goods from the possession of Williamson, the plaintiff in replevin.

Being of opinion that it is a general principle of the common law, that replevin can be maintained in all cases where the plaintiff's goods have been wrongfully taken from his possession, and that the exception of goods taken in execution applies only to the debtor himself, I think that the motion to quash the replevin, on the ground that the goods were in the custody of the law when the replevin was served, and also the motion for a *venditioni exponas*, ought to be overruled.

MORSELL, J., concurred. THRUSTON, J., dissented.¹

¹ See *Cullum v. Bevans*, 6 Har. & Johns. 469. See also *Burnley v. Lambert*, 1 Wash. 308, where the Court of Appeals of Virginia say, "But if an execution issue against the goods of A, and the sheriff seize and sell the property of B, will it be said that this is done by lawful authority? surely not."

See also *D'Wolf v. Harris*, 4 Mason, 515, 530, &c.

Since the above opinion was delivered, the Supreme Court of New Jersey has decided in the same way, at May term, 1830, in the case of *Matthias Bruen v. Oliver W. Ogden*, which was replevin by a third person against the United States Marshal of the District of New Jersey, for the plaintiff's goods taken in execution for a debt due by the defendant in the execution; which was issued out of the District Court of the United States for that district.

This matter being pleaded by the defendant in replevin, in the State court, the plaintiff demurred, and the court held that, as the plea contained no averment that the vessel taken in execution, was the property of the debtor, or seized in his possession; and as the goods of a person in his actual or constructive possession, if seized under color of an execution against another person, are replevisable, the matters set forth in the plea were no bar to the action; and that the cause of action, as exhibited in the declaration and plea, was within the jurisdiction of the State court, and not within the exclusive jurisdiction of the courts of the United States. See the *National Gazette of Thursday, 27 May, 1830*.

See also *Buffington v. Gerrish*, 15 Mass. Rep. 156, replevin of goods attached.

In this case of *Williamson v. Ringgold*, after the motion to quash the replevin was

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CALEB PERKINS v. JOSEPH W. BECK.

A tender of money upon condition of receiving change, and a receipt in full for rent, is not a legal tender.

TRESPASS for distraining for more rent than was due. The plaintiff offered evidence to prove that before the distress he offered to pay the landlord \$60, if he would give him change, (the rent due being \$54.19,) and a receipt in full for the rent.

The COURT (MORSELL, J., absent,) decided that it was not a legal tender.

THE CHESAPEAKE AND OHIO CANAL COMPANY v. AMOS BINNEY.

Quære, whether a person who subscribed for stock in the Chesapeake and Ohio Canal Company, without paying a dollar a share at the time of subscribing, and who has never been required to pay any of the instalments called for by the company, can be considered as a stockholder, so as to disqualify him to serve upon an inquisition to condemn land for the canal? It is not necessary that an inquisition, taken under the charter of that company, should contain the names of such jurors as were summoned but not sworn. The land condemned is sufficiently described by reference, in the inquisition, to the description of it in the warrant.

CRANCH, C. J., delivered the opinion of the Court. (THRUSTON, J., not sitting.)

This was an inquisition condemning land for the canal, under the 15th section of the charter.

Mr. Key, for the defendant, moved to set aside the inquisition.

1st. Because *Mr. John G. Wilson*, one of the jurors, was a stockholder in the company.

2d. Because the whole number (18) of jurors summoned, were not named in the inquisition.

3d. Because the land valued is not described in the inquisition, otherwise than by reference to the warrant.

1. It is alleged that he was a stockholder because he was an original subscriber.

The facts, in regard to this question, are admitted to be, that *Mr. Wilson* subscribed for three shares of the stock, but has

overruled, the cause came on for trial, at the same term, (19 May, 1830,) upon the plea of property in the defendant; "without that, that the property was in the plaintiff;" upon which traverse the issue was joined.

The Court decided that the affirmative was on the plaintiff to prove his property in the goods; and at the prayer of the defendant's counsel, instructed the jury, that the bill of sale from Wells under which the plaintiff claimed title, was fraudulent as to Carberry, the creditor of Wells, the defendant in the execution, unless the possession accompanied the bill of sale and continued in Williamson the vendee.

Verdict for defendant.

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never paid the dollar per share required by the charter to be paid at the time of subscription. That, sometime afterward, in speaking of the stock to several persons, among whom was Mr. A. Hunter, he remarked, that he wished he had not taken any of the stock. Mr. Hunter replied that if he was tired of it, he would take it off his hands. That Mr. Wilson told him he should have it, and he never gave himself any further trouble about it, as he did not consider himself a stockholder; and was not aware that his name was on the list of stockholders until he was informed of it since the taking of the inquisition. That Mr. Hunter was one of the commissioners for receiving subscriptions at Harper's Ferry, where Mr. Wilson subscribed, and put his initials opposite the name of Mr. Wilson as having received the subscription money. That Mr. Wilson never paid any thing upon the stock, and has never been required to pay any of the instalments which have been called for by the company. That his name was returned, as a subscriber, by the commissioners, to the board of public works in Virginia, agreeably to the second section of the charter.

By the 5th section it is provided, that upon all subscriptions which shall not be paid in the certificates of the stock or debts of the old Potomac Company, there shall be paid, at the time of subscription, on each share, one dollar; and thereafter, when the company shall be formed, the whole stock subscribed shall be paid in such instalments, and at such times as the president and directors shall, from time to time, require; and when any subscriber shall fail to pay any instalment called for by the company, it shall be lawful for the company, upon motion and ten days' notice, to obtain judgment against the subscriber so failing to pay; or may sell the stock of such subscriber, and the purchaser shall become a stockholder, and entitled to the same privileges as an original subscriber.

And, by the 17th section, the stockholders may transfer their shares by deed registered in the company's books, and not otherwise, except by devise.

It is clear by the state of the case, that Mr. Wilson was not interested in the stock of the company at the time of the taking of the inquisition, unless he could then have been compelled to pay either the original dollar per share required to be paid at the time of subscribing, or to pay the instalments, or had then a right to make such payment and become a stockholder. He certainly was not then a stockholder, having never paid for, nor purchased any part of the stock; nor do I think he could then be called a subscriber; for there could be no valid subscription which could bind the company to admit him as a partner unless the dollar per

Barrell v. Limington.

share were paid at the time of subscription. There was no means of compelling him to pay the dollar per share. The remedy, given by the 5th section, is only for instalments called for by the president and directors, after the company was formed. I do not think he was a subscriber within the meaning of the charter so as to be charged with instalments, and to participate in the profits of the company.

But if I should be mistaken in this view of the subject, as my brother judge, for whose opinion I have the highest respect, thinks I am, I concur with him in opinion, that if Mr. Wilson had been legally bound to pay the dollar per share which was to have been paid at the time of subscription, and might have been held bound at law to pay the instalments, yet, under the circumstances of this case he might be relieved in equity, and would, as a stockholder, be considered as a mere trustee for Mr. Hunter. I consider him, therefore, as having been quite free from any interest whatever in the stock of the company at the time of taking the inquisition.

2. The second cause alleged for setting aside the inquisition is, that the names of those jurors who were summoned but not sworn upon the inquest are not given in the inquisition.

As I cannot perceive why they should have been named in it, I cannot see that the omission to name them is any cause for setting it aside.

3. The third cause alleged for setting it aside is, that the land condemned is not described in the inquisition otherwise than by reference to the warrant, which the marshal in his inquisition, says he returns therewith.

Id certum est quod certum reddi potest.

I do not see any use in burdening the records with a repetition in the inquisition, of the description contained in the warrant.

These seem to me to be the only objections, applicable to this case, which were not considered and overruled in Mr. Key's case at May term, 1829; and are also now overruled.

At December term, 1830, the inquisition was set aside because the jury by mistake had not given damages for a bridge which Mr. Binney was obliged to build to connect his land, which was intersected by the canal.

BARRELL v. LIMINGTON.

Notice of taking a deposition, under the Act of 1789, § 30, directed to the party himself, may be served on his attorney-at-law.

Mr. Coxe, for the defendant, objected to a deposition taken on

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the part of the plaintiff, that the notice, directed to the defendant himself, was served only upon his attorney-at-law in the cause.

The COURT, however, (*nem. con.*) overruled the objection.

CHARLES S. FOWLER v. PEREGRINE WARFIELD.

Notice to an indorser, if sent by mail, must be directed to the post-office of his place of residence.

ASSUMPSIT by the indorsee against his immediate indorser of a draft by T. B. Pottinger on John E. Dorsey, at Baltimore, to the order of Thomas Mustin, indorsed by him to the defendant and by the defendant to the plaintiff for \$300, at sixty days from September 13th, 1828.

The defendant's residence was notoriously at Georgetown, D. C., where there was a post-office, distant three miles from the post-office in Washington, D. C. The notary who protested the draft at Baltimore, put into the post-office there, a notice directed to the defendant at Washington.

The plaintiff proved by George Sweeny, who was then a clerk in the post-office at Washington, that it was customary, when a letter was directed to that office for a known resident in Georgetown, to forward it to the post-office there; but it was uncertain whether it would be so forwarded by the mail on the same day on which it arrived, as it might not be noticed by any one who knew that the residence of the person to whom it was directed was in Georgetown. That he knew that the defendant resided in Georgetown, but had no recollection of sending such a letter.

The COURT (*nem. con.*) at the prayer of the defendant, instructed the jury, that this evidence of notice was not sufficient to charge the defendant in this action; upon the authority of the case of the *Bank of United States v. Corcoran*, 2 Peters, 121. *Non-pros.*

JAMES THOMAS ET UX.'S LESSEE v. JOEL CRUTTENDEN.

A person, claiming title under a deed from commissioners of bankrupt, (under the Bankrupt Law of 1800,) must show their authority, and that their proceedings were regular, &c., as they exercised only a special, limited power; but if the records are destroyed, the next best evidence will be received.

EJECTMENT. Defence on title. The plaintiff, having shown title in Washington Bowie, offered in evidence a deed from E. B. Caldwell, and purporting to be executed by them as commis-

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sioners of bankruptcy to Walter Smith and Charles Wayman, assignees of the bankrupt; and offered to prove, by W. Brent, the clerk of this Court, that the bankrupt papers and records, in cases where commissions were issued by a judge of this Court, were destroyed by the enemy in 1814; and by W. Cranch, that he, as assistant judge of this Court, issued a commission of bankruptcy against Washington Bowie. And the plaintiff further offered in evidence a deed from the assignees to Baltzer, under whom the plaintiff claims; and a decree in chancery ordering a sale of this, as part of the real estate of Baltzer, and possession of the purchase under that decree; and also produced a certificate of the clerk of this Court, made in January, 1804, that this Court, in December term, 1803, decreed that the deed from the commissioners to the assignees should be recorded; and further proved that all the records and papers of that term were destroyed by the enemy. Those deeds recited the proceedings under the bankrupt law of 1800.

Mr. Redin, for the defendant, objected to the admission of the deed from the commissioners to the assignees, because all the proceedings under the commission of bankruptcy must be proved; nothing can be presumed; it is a special tribunal of limited powers and jurisdiction, &c.

Mr. Marbury and *Mr. Key*, for the plaintiff, admit that everything necessary to support the jurisdiction and authority of the commissioners must be proved; but the question is, by what sort of evidence. The records and original papers are all destroyed. The next best evidence is that which is now offered. The recitals in the old deeds, recorded in 1802, twenty-eight years ago; the destruction of the original papers and records; the certificate of the clerk recorded in January, 1804, that a decree was passed by this Court in December, 1803, authorizing the recording of the deed; the long possession under that deed; are circumstances from which the jury may infer all the necessary proceedings under the bankrupt law.

The COURT was of that opinion, (*nem. con.*) and the jury rendered their verdict for the plaintiff.

HELLRIGLE'S HEIRS v. HENRY OULD.

In 1828, city lots in Washington, D. C., could not be sold for taxes due to the corporation, if there was upon them personal property sufficient to pay the taxes. The charter of 1820, was the only authority under which such lots could be sold, and that act does not, in such case, authorize the sale, by the collector, even with the assent of the person to whom they are assessed, or even with the assent of the true owner.

The collector could not sell the fee-simple, if the tenant was tenant for life only, and if the estate for life was of sufficient value to pay the taxes.

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Quere, whether the tenant in whose name a lot is assessed, can, by suffering the taxes to accumulate, get a better title than he had before, by a collector's sale for his own default.

EJECTMENT for lot No. 7, in the square No. 320, in the city of Washington. The plaintiffs claimed as heirs or devisees of Philip Hellrigle. The defendant claimed under a tax-sale.

The cause was tried on the 27th and 28th of May, 1830, when *Mr. Key* and *Mr. Marbury*, for the plaintiffs, prayed the Court to instruct the jury, that the defendant gained no title under the collector's sale given by him in evidence.

The question was fully argued by *Mr. Coxe* and *Mr. Jones*, for the defendant, and by *Mr. Key* and *Mr. Marbury*, for the plaintiffs, and the Court being about to deliver the following opinion, in which the judges were unanimous, the parties came to a compromise.

Opinion of the Court. The question is, whether the heirs of Philip Hellrigle were divested of their legal estate in the lot in question, by a sale made in the year 1828, by the collector of taxes for the city of Washington, under the following circumstances.

Some time between the years 1820 and 1824, the lot was sold by a collector of taxes in Washington, for taxes assessed to "The heirs of Hellrigle," and was purchased by Mr. James M. Varnum, who obtained a deed for the same from the mayor, and sold it to another, under whom the present defendant entered and built a house on the lot.

That sale was void by reason of some irregularity in the proceedings.

Subsequent taxes were assessed upon the lot, in the name of the defendant, which he did not pay, but authorized the collector, in writing, to sell the same, although there was personal property enough, of his own, upon the lot, to pay them; and at the same time avowed his purpose to be to cure a defect in his title. The sale was accordingly made after the passing of the Act of Congress of the 26th of May, 1824, [4 Stat. at Large, 43,] the same having been advertised agreeably to the second section of that act, in which advertisement the name of the defendant was stated as the name of the person to whom the same was assessed on the books of the corporation.

At that sale the defendant became the purchaser; and the property, not having been redeemed within the two years allowed by the Act of 1820, § 10, he obtained a deed in fee form from the mayor under the seal of the Corporation of Washington.

At the time of the said assignment and advertisement and sale respectively, the legal estate was in Barbara Hellrigle, the widow

of Philip, as tenant for life under the last will of her husband, the remainder in fee having descended upon the lessors of the plaintiffs, some of whom were, and yet are minors, under the age of twenty-one years; and who have, therefore, a right still to redeem under the tenth section of the Act of 1820, and the sixth section of that of 1824. The lot could have been leased for five or six dollars a month, and the amount of taxes due at the time of sale was ten dollars. The widow died some months after the sale. The whole lot was sold to the defendant himself for the exact amount of the taxes due upon it and the expenses of sale.

The question is, whether this sale divested the lessors of the plaintiff of their title?

The Act of 15th May, 1820, is the only act which authorizes the sale. The lot could not have been lawfully sold by the collector, under that act, if there was upon it personal property of sufficient value to pay the taxes. That act does not authorize it to be sold by the collector, in such case, even with the assent of the person to whom it should be assessed; nor even with the assent of the true owner. The assent, indeed, of the true owner might have barred himself from controverting the validity of the sale; so the assent of the person in whose name it is assessed is, perhaps, sufficient to bar him, but not the true owner, nor any other person. The sale, therefore, was void as to the true owner; not because it was not assessed or advertised in the name of the lawful owner, nor by reason of the amount of taxes due thereon not being correctly stated, which are the only irregularities cured by the second section of the Act of 1824; but because the lot itself was not liable to be sold.

Again. The lot, that is, the fee-simple estate in the lot could not be sold, when there was a tenant for life, whose estate was sufficient to defray the taxes thereon. The 10th section contains an express prohibition to that effect. "Provided also, that no sale shall be made, in pursuance of this section, of any improved property, whereon there is personal property of sufficient value to pay the said taxes." "And provided, moreover, that where the estate of the tenant in default, as for years, or for life or lives, shall be sufficient to defray the taxes chargeable thereupon, such estate only shall be liable to be sold under the provisions of this act."

It is said that the officers of the corporation did not know that there was such a tenancy for life, as the will, under which it was claimed, was made in Bladensburgh, (out of this district,) and proved in Alexandria, where the testator died and had assets.

But the prohibition has no exception in such a case. If the corporation sell, they sell at their peril. They are bound to inquire

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what kind of an estate the person has, to whom they assess the taxes, before they proceed to sell.

If the fact was, at the time of sale, that there was a tenant for life, whose estate was sufficient to defray the taxes chargeable thereupon, that estate only could be sold.

Again. The person in whose name the property is assessed may be considered *prima facie* the true owner until the contrary appears. The defendant in the present case has submitted to the assessment, and admitted that he is the person chargeable with the tax, and for whose default the lot was sold, by giving his assent that it should be sold, although there was upon the lot, at the time of sale, personal property, of sufficient value to pay the taxes then due.

Can a person, by suffering a lot to be sold for his own default, and becoming the purchaser at the sale, get a better title than he had before?

This is an important question, which the Court, at present, is not prepared to answer; and as the opinion, upon either of the two former points, is decisive of the question submitted, the Court will not undertake to decide the latter until its decision shall become necessary.

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THE CHESAPEAKE AND OHIO CANAL COMPANY v. THE UNION
BANK OF GEORGETOWN.

Where several warrants have been issued and returned, with inquisitions for condemning land for the use of the company, and each inquisition refers to the warrant returned therewith, it is competent to prove by parol which warrant is applicable to each inquisition.

The jury ought to ascertain and describe the bounds of the land by them valued, and the quality and duration of the interest and estate in the same.

The Canal Company is the sole judge, what interest in the land will be necessary for their operations, and the jury are to value such interest as the company shall require.

The charter does not require notice to be given to the party whose lands are sought to be condemned; and, therefore, the inquisition need not state that such notice has been given; but it ought, in fact, to be given, if the party be, at the time, within the county.

It is not necessary that the inquisition should state the value of the land separately from the damages.

The benefit to the owner may be as well set off against the value of the land as against the damages.

Quære? Whether it be necessary that the jury should ascertain the bounds of the land, upon the land itself, by metes and bounds?

In authorizing the condemnation of lands for a highway, the United States only claim to exercise the power which belongs to every sovereign, to appropriate private property to public use.

THIS was a motion, by Mr. J. Dunlop, to set aside an inquisition condemning land in Washington for the use of the Chesapeake

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and Ohio Canal Company, under the fifteenth section of its charter of January —, 1824, granted by Virginia, and confirmed by Pennsylvania, Maryland, and the United States.

The case was argued by *Mr. Key* and *Mr. Dunlop* for the Union Bank, and by *Mr. Swann* and *Mr. Jones* for the Canal Company.

CRANCH, C. J., delivered the opinion of the Court : —

1. The first objection to the inquisition is, that the name of the owner of the land does not appear in the inquisition ; and although the inquisition refers to a warrant supposed to be returned therewith, yet that warrant is not annexed to the inquisition, nor referred to by any mark or other description by which it can be ascertained to which of the various warrants returned, it refers.

In answer to this objection, we think it is competent for the clerk to whom, by law, it was returned ; or for the marshal who took and returned the inquisition and warrant, to prove, by parol, the fact of the return, and to designate which warrant was returned with the inquisition. It is admitted in argument that a warrant was returned and filed with this inquisition ; in which warrant the property proposed to be valued is stated to be the property of the Union Bank of Georgetown ; and the inquisition with which it was returned and filed, is marked on the margin with these letters : "Pt. & Drs. U. B."

We think it is competent for the Canal Company to prove those facts by parol.

2. The second and third objections are, that the property is not sufficiently described either in the warrant or inquisition.

The description is in these words : "All those parts of a lot of land, lying in the county aforesaid, and known and recorded as lots 'eight,' (8), 'nine,' (9), and 'ten,' (10), in the square 'one,' (1), in the city of Washington, which lie west of the west side of Twenty-eighth (28) Street west ; and all those other pieces of land belonging to said lots, or any of them, and being due west of the said lots, or any of them, and extending thence to, and binding with, the channel of Rock Creek,— the property of the president and directors of the Union Bank of Georgetown."

It is evident, that neither the bounds of those parts of lots eight, nine, and ten, which lie west of Twenty-eighth Street west, if any such there be ; nor of the pieces of land belonging or appertaining to said lots, are ascertained and described by the jury. The square "one," is bounded on the west by Twenty-seventh Street west ; therefore no lot, in square one, can extend west of that street. If any of the lots, in square one, have privileges extending west of that street, such privileges are not parts of such lots, but appurtenances thereto. The pieces of land which are sup-

posed to be "belonging or appertaining to said lots," are described as lying due west of the said lots; but whether contiguous thereto, or at what distance therefrom, does not appear. They are said to be extending thence. Whence? Not from the place where they were lying, for that would make them extend beyond themselves; not from the lots eight, nine, and ten, for Twenty-eighth Street intervenes; not due west of the same lots, for that designates no place at all. It is impossible to locate these appurtenances from the description. Nor does the plat of square one, as recorded on the surveyor's books, or the engraved plan of the city, cure the defect. It does not appear that any water privilege is, by law, or by any authoritative regulation, in regard to the plan of the city, annexed to those lots; or, if there is, the extent of it does not appear to have been defined; the jury, therefore, ought to have ascertained and described the bounds of the land by them valued; and not having done so, the inquisition must be set aside. It is much better for all parties, that the error should be now corrected by a new inquisition, than that it should be left for future litigation.

4. The fourth objection is, that the jury have not "described and ascertained the quality and duration of the interest and estate in the same required by the company for its use."

The only reason for introducing this provision into the fifteenth section of the charter, seems to have been to show what quantity of interest in the land was in the contemplation of the jury at the time of the valuation; for that quantity of interest, only, would pass by the valuation. The jury were to value such interest only as the company should require; it was, therefore, necessary that it should appear, in the inquisition, what that interest was.

It has been supposed, in argument, that the jury was to ascertain whether that interest was or was not needed by the company. The word, however, is not "needed," but "required," by the company, who are the sole judges what interest in the land will be necessary for their operations; and the jury are to value such interest as the company shall require.

The fifteenth section of the charter authorizes the condemnation of land for the temporary use of the company in the construction of their works, as well as a more permanent interest for the actual bed of the canal, and the site of their locks, dams, ponds, and feeders; and the jury is to value the land itself, "as of an absolute estate in perpetuity," "or the partial or temporary appropriation, use, or occupation of such land," according as the same shall be required by the company; and upon such valuation, "and on payment thereof, the said company shall be seized of such land as of an absolute estate in perpetuity, or with such less quantity and duration of interest or estate in the same; or subject to such par-

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tial or temporary appropriation, use, or occupation, as shall be required and described as aforesaid, as if conveyed by the owner to them."

From a consideration of these and other provisions of this section, it seems to us very clear, that the canal company, so far as relates to the duty of the jurors, was to be the sole judge what interest in the land was required by the company; and that the only reason why the jury is to describe and ascertain the quality and duration of the interest required by the company is, that it may be known what sort of interest is valued by the jury, so as to know what interest passes to the company by the valuation and payment.

The warrant states that the canal is intended to pass through certain land, and that the said land, (therein described,) "is needed as of an absolute estate in perpetuity, for the making of the said canal and its appurtenant works."

The jury in the inquisition "say, that all the said land described in the said warrant as of an absolute estate in perpetuity and all damages," &c., "are of the value of one thousand dollars."

They have, therefore, clearly expressed, in their inquisition, "the quality and duration of the interest and estate," in the land which they have valued. Its quality is "absolute," and its duration is "in perpetuity." They have not, indeed, stated that the company required an interest and estate of such quality and duration; but this they were not bound to do. They have stated what sort of interest and estate they valued; and the warrant which is returned with, and, by reference, made part of the inquisition, shows that the company required such an interest and estate as they have valued. They have, therefore, "described and ascertained the quality and duration of the interest and estate," "required by the company for its use," which is all they were, in this respect, bound to do.

Much stress, in the argument, was laid upon the word "as," in the finding of the jury in these words: "The jury say that all the said land described in said warrant as of an absolute estate in perpetuity," "and the damages," &c. "are of the value of one thousand dollars;" whereas, in the warrant, the words, "as of an absolute estate in perpetuity," do not constitute any part of the description of the land; so that it is uncertain what interest or estate in the land the jury valued.

But this uncertainty is removed entirely by noticing the comma, placed after the word "warrant," in that sentence, which disconnects the word "as" from the word "described," and throws it into the latter clause of the sentence, so as to connect it with the valuation. It is evident, therefore, that the whole sentence ought to be read thus: The jury "say, that the said land described in

the said warrant, as an absolute estate in perpetuity and the damages are of the value of one thousand dollars;" showing that they valued the land as of an absolute estate in perpetuity.

5. The fifth objection is, that the inquisition does not show that notice was given to the Union Bank, of the time and place of taking the inquisition.

The charter does not require notice to be given to any of the parties interested. But as the marshal is to summon jurors not related to the parties, it seems to be necessary that the parties should be named in the warrant; and, perhaps, it may be good cause to set aside an inquisition taken under this charter, that the real owner had no knowledge of the time and place of taking it, if he was, at the time, within the county.

But the warrant and inquisition are in the nature of a writ of *ad quod damnum*, which was a writ to inquire whether a grant, intended to be made by the king, would be to the damage of him and others.

The making of a new highway, or the change of an old one, is an act of sovereign power; and the writ is issued at the mere motion of the sovereign himself, to inform his conscience. It is, therefore, an *ex parte* proceeding; as will be seen in the forms of the writ in *Registrum Brevium*, 247 to 255. The king commands the sheriff that by the oath of good and lawful men, "you inquire whether it will be to the damage or prejudice of us or of others if we grant to I., that he may give and assign one messuage, &c., in W. to a certain chaplain, &c., to perform divine services for the good of his soul," &c., "and if it should be to the damage and prejudice of us or of others, then to what damage and prejudice of us, or of others, and of whom," &c. "And an injunction thereof distinctly and openly made to us in our chancery, under your seal, and the seals of those by whom it shall have been made, without delay you send, and this writ." Test, &c.

In folio 255, is a like form for granting a mill-race; and in none of the forms is the sheriff required to give notice to any of the parties; nor does the oath in the present case require the jurors themselves to say whether notice was given or not.

It seemed to be admitted in argument that notice had been actually given to Mr. Beverly, the president of the Union Bank, and that he attended. If such was the fact, I do not think the inquisition should be set aside merely because it does not in itself contain the evidence of notice.

6. The sixth objection is, that the jury have not distinguished between the value of the land and the damages, but have found the value and damages all in one sum.

The oath is to "value the land and all damages," &c., "and

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in every such valuation and assessment of damages," the jury are "instructed to consider, in determining and fixing the amount thereof, the actual benefit," &c., "and to regulate their verdict thereby;" except, that "where such benefit shall exceed, in the estimate of the jury," "the value and damages ascertained as aforesaid," the owner shall not be required "to pay or contribute any thing to the said company."

The benefits to be derived, therefore, may be as well set off against the value of the land as against the damages, and we see no reason, why the jury may not find the result in one entire sum.

7. The seventh objection is, that the jury have not stated that they described and ascertained the bounds of the land upon the land itself by metes and bounds.

The charter directs the jury "to describe and ascertain the bounds of the land by them valued."

I think this requires them to describe the lands which they value, and to state the bounds thereof with certainty, so that it may be known what they valued, and what would pass to the company upon payment of the valuation. It does not necessarily imply that they themselves were to run and measure the lines, or to see it done by a surveyor.

8. The eighth objection is, that by the Maryland Act of cession to the United States, of this part of the District of Columbia, 1791, c. 45, § 2, Congress are restrained from affecting the rights of individuals to the soil, otherwise than as the same should be transferred to the United States by such individuals; and it is contended that this prohibits the United States from taking private property in this district, for public use; and that the right of sovereignty, which Maryland exercised, was not transferred.

We think it is a sufficient answer to this objection, to say that the United States do not, by this inquisition, or by the charter to the Chesapeake and Ohio Canal Company, claim any right of property in the soil. They only claim to exercise the power which belongs to every sovereign to appropriate, upon just compensation, private property, to the making of a highway, wherever the public good requires it.

MORSELL, J., concurred in the judgment to set aside the inquisition, and in the opinion, except as to the 5th and 7th objections. In regard to the 5th he was of opinion that notice ought to appear somewhere in the record; and as to the 7th, that it should also appear that the jury saw the lines run upon the land.

THRUSTON, J., did not sit in the cause.

Inquisition set aside, and a new one ordered.

BANK OF THE UNITED STATES, LESSEE, v. WILLIAM BENNING.

If the proceedings in equity have not been recorded at full length, the original papers, documents, and docket-entries, may be adduced and used in court as constituting the record of the case.

An original deed, which has been recorded in the land-records under a decree in chancery in conformity with the Act of the Legislature of Maryland, 1792, c. 41, § 3, may be adduced in a subsequent action of ejectment, and identified as the deed thus ordered to be recorded, although it did not continue to remain on file in the suit in which it was ordered to be recorded.

The record copies in the books of land-records may be read in evidence without proving the execution or loss of the original deeds.

Parol evidence may be given that the persons who took and certified the acknowledgment of a deed of real estate, were, at the time of taking and certifying the same, justices of the peace; and it is not necessary that their official character should appear on the face of their certificate of acknowledgment.

The parties to deeds are estopped to deny the truth of the recitals therein; and if the deeds are offered only to show the transmission of the legal title, the truth of the recitals need not be proved *aliunde*.

If a deed of bargain and sale be made by a trustee, the legal estate passes whether the terms of the trust are complied with, or not; for if the bargainee takes with notice, he himself stands as trustee in place of the bargainor; if without notice and for valuable consideration, he takes an absolute title; for a trustee conveys by virtue of the legal estate vested in him, and not by virtue of a power.

A deed of bargain and sale, by a person not in possession, is void.

When the plea is not guilty, or defence on title, the defendant may give evidence of possession without warrant and location.

EJECTMENT, for the western moiety of lot No. 2, in the square No. 348, in the city of Washington.

It was agreed that the plaintiffs need not trace their title farther back than to the commissioners of the city of Washington.

The plaintiffs claimed title by a deed from those commissioners to John Murdoch, December 19, 1801; from Murdoch to Walter Smith, April 5, 1805; and from Charles Lowndes to the said Smith, May 3, 1803; from the said Smith to Benjamin Stoddert, March 5, 1807; from Stoddert to T. G. Slye, March 5, 1807; and from Slye to the lessors of the plaintiffs, July 10, 1828.

Upon the trial, *Mr. Key*, for the plaintiff, offered to read these deeds from the copies in the land-record books of this county; except the deed from Stoddert to Slye, the original of which he produced, dated March 5, 1807, but not recorded until July 27, 1826, when it was recorded under a decree of this Court as a court of chancery, in pursuance of the provisions of the Maryland Act of Assembly of 1792, c. 41, § 3, upon a petition by the Bank of Columbia, who then claimed under the deed.

The record of that case not having been made out in full by the clerk, the plaintiffs' counsel offered to read to the Court the original papers, docket-entries, and minutes of the proceedings and decree in that case; but the original deed, which had been filed with the petition and continued on the files in that cause

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until the passing of the decree for recording, had been taken from the files to be recorded in the book of land-records, with the decree, and after being recorded, was delivered to petitioners, who kept it till it was now produced here in court. No other evidence was offered of its execution, but the clerk had by an indorsement upon it certified that it was recorded by virtue of the decree of the court.

It appeared by the recitals in some of the deeds, that the deed from Murdoch to Walter Smith was a trust-deed, and the defendants contended that the plaintiffs must show that the deed from W. Smith to Stoddert was in pursuance of, or in conformity with the terms of the trust; and that the facts stated in the recitals must be proved *aliunde*, as the defendants not being a party to, nor claiming under these deeds, is not bound by those recitals.

The defendant's counsel, *Mr. Coxe* and *Mr. Jones*, objected, that it did not appear by the certificate of the persons who took and certified the acknowledgment of the deed from W. Smith to B. Stoddert that they were then justices of the peace.

The plaintiffs' counsel then offered parol evidence of that fact, and that they were then known and acting as such, and also the record of their qualification as such by taking the oaths of office.

To all the evidence so offered on the part of the plaintiff the defendant's counsel objected.

But the COURT (*THRUSTON, J.*, absent,) overruled all the objections, and permitted the evidence to go to the jury; (the defendant not having shown any title or color of title in himself;) *CRANCH, C. J.*, however, doubting whether the record-copies of the deeds can be read in evidence without showing the loss of the original.

The Court also held and decided,

1. That the deed from Lowndes to Smith may be given in evidence without showing what sort of interest the grantor had, because the legal estate is not claimed through him.

2. That it was not necessary, in order to admit the deed from Smith to Stoddert to be recorded, that the certificate of acknowledgment should state upon its face, that Thomas Corcoran and Richard Parrott, who took and certified the acknowledgment, were justices of the peace at the time of that acknowledgment.

3. That the recitals in the deeds, are evidence as between the parties to those deeds, of the facts therein stated; that those parties are estopped to deny the truth of those facts; and that, as the purpose of offering those deeds on the part of the plaintiff is only to show the transmission of the legal title from the bargainors to the bargainees, it is not necessary for the plaintiff to prove the truth of those recitals.

4. That it is not necessary for the plaintiff to show, that W.

Smith, the trustee, had precisely followed the terms of the trust ; but that the legal estate would pass to the bargainee, whether the terms of the trust were complied with or not. If the bargainee took with notice of the trust, he would stand as trustee in the place of W. Smith ; if without notice and for valuable consideration, then he took an absolute title ; so that, in either event, the legal title would pass, and the *cestui que trusts* only could complain ; and that, in a court of equity. W. Smith did not convey by virtue of a power ; but by virtue of the legal title vested in him.

The defendant then offered evidence that he and those under whom he claimed, were in possession, under an adverse claim of title from the year 1816 up to, and at the date of the deed from Slye to the Bank of the United States.

Mr. Key, for the plaintiff, objected to evidence of possession without a warrant and location.

The COURT overruled the objection ; the plea being not guilty, or defence on title.

The COURT (*nem. con.*) was of opinion that as Slye was not seized of the lot at the date of his deed of bargain and sale to the Bank of the United States, the plaintiff could not recover in this action.

Verdict for the defendant. The plaintiff took a bill of exceptions, but no writ of error was issued.

UNITED STATES v. EDWARD P. HALE.

An indictment for obtaining goods from a person, by the defendant, upon a false pretence that he was the master of a vessel, and a man of property and substance, and by exhibiting two letters to himself, written by strangers, and addressed to him by the name of Captain Edward Hale, from which it might be inferred that he was interested in some vessel, whereby the complainant was induced to sell certain goods to the defendant, upon his giving his note for the amount, (\$50,) at thirty days, does not set forth an offence indictable at common law, for want of such false tokens as the common law recognizes.

THE indictment charged that the defendant, on the 5th of February, 1830, "unlawfully, knowingly, and designedly did falsely pretend to one James Green, that he, the said Edward P. Hale, was the captain and master of a vessel, and was a man of property and substance ; and to gain credit with the said James Green, and to induce him to sell his furniture to him, the said Edward P. Hale, he, the said Edward P. Hale, did exhibit and show to the said James Green, and to one John Muir, then acting as clerk to him, the said James Green, a letter directed to him,

Auld v. Auld.

the said Edward P. Hale, under the name and style of Captain Edward Hale, Washington city, which said letter is in the words and figures following;" (here the letter was copied into the indictment, dated, "Old Point Comfort, January 24, 1830," and signed, J. Johnson. From this letter an inference might be drawn that the defendant was interested in a schooner, then in the possession of the writer,) "and one other letter directed to him, the said Edward P. Hale, by the name and style of Captain Edward P. Hale, Washington, D. C., which said letter is in these words and figures, to wit." (Here a copy of the letter is inserted in the indictment, dated Washington, 16th January, 1830, and signed "Charles W. Muncaster," from which an inference might be drawn that the defendant had advertised a vessel for New Orleans.) "By means of which false pretences, the said Edward P. Hale did then and there obtain credit with the said James Green, and did, then and there, unlawfully, knowingly, and designedly purchase and obtain from him, the said James Green, one bureau, of the value of fifteen dollars," (&c., amounting, in the whole, to \$50,) "and did then and there pass his note towards the payment of the said articles, for the sum of fifty dollars, in thirty days from the date thereof, with intent then and there to defraud and cheat the said James Green of the said articles of furniture; whereas, in fact and in truth, the said Edward P. Hale was not then the captain or master of any vessel, and was not a man of property or credit; and whereas, also, the said Edward P. Hale, at the time he so purchased the said articles, as aforesaid, well knew that he was not able to pay the said note, so given for the payment of the said articles as aforesaid, nor did he ever pay the same, or any part thereof, to the said James Green, to the great damage and deception of the said James Green, to the evil example of all others in like cases offending, and against the peace and government of the United States."

Thomas Swann, Attorney for the United States.

Upon the trial, the COURT, on motion of *Mr. Coxe*, for the defendant, instructed the jury, that the indictment did not set forth an offence indictable at common law, for want of such false tokens as the common law recognizes.

Verdict, not guilty.

ANN AULD v. JAMES AULD.

A BILL having been filed for alimony,

The COURT, upon the petition of the complainant, for a temporary support *pendente lite*, ordered two dollars a week to be paid to her until the further order of the Court.

CHESAPEAKE AND OHIO CANAL COMPANY v. PATRICK DULANY.

A person who becomes a member of a corporation is bound to know the obligations which he thereby incurs.

Those obligations are matters of law resulting from the construction of the charter.

If both parties were equally mistaken as to that construction, it is no ground in equity or law, for setting aside the obligation of the contract.

MOTION, by *Mr. Wallach*, for the plaintiffs, for judgment against the defendant, Patrick Dulany, for the amount of the instalment called for by the company, on his shares, upon ten days' notice, under the 5th section of the charter of 27th of January, 1824.

CRANCH, C. J., delivered the opinion of the Court (*nem. con.*) as follows :

The defence set up in this case is, that the defendant subscribed under a mistake as to the right of the plaintiffs to coerce payment of future instalments; and that he was led into that mistake by the opinion of Mr. McCleary, who took from him his power of attorney to Mr. Smith, to subscribe; and who, in answer to an inquiry by the defendant, said that he did not think that the future instalments would be enforced, but that the shares might be forfeited by their non-payment.

The defendant, when he became a corporator in this company, was bound to know the obligations which he thereby incurred. Those obligations were matters of law resulting from the construction of the charter. Whether a subscriber was or was not liable to pay future instalments, was a question of law arising upon that construction. If both the parties were mistaken as to that construction, it is no ground, in equity or law, for setting aside the obligation of the contract. 1 Fonblanque, 106; *Lord Irnham v. Child*, 1 Bro. C. C. 91; *Howard v. Hopkins*, 2 Atk. 371; *Gwinn v. Poole*, Lutw. 1569; Powell's opinion; Dig. 22, tit. 6; Cod. 1, 18; "*De juris et facti ignorantia*"; Code Napoleon, 2052, 2053, 2058; Eden on Injunctions, p. 10, and the cases there cited.

Before the Court delivered its opinion, *Mr. Key*, for the defendant, referred to the following authorities, as to mistake of fact or law. *Gee v. Spencer*, 1 Vern. 32; *Graham v. Henderson*, 5 Mun. 185; *Armstrong v. Hickman*, 6 Id. 287; Powell on Contracts, 196; Newland, 432; Pothier, 14; *Jolliffe v. Hite*, 1 Call, 301; *Lyon v. Richmond*, 2 Johns. Ch. Ca. 51; *Blennerhasset v. Day*, 2 Ball & Beattie, 128; *Gray v. Chiswell*, 9 Ves. 125; *Wiser v. Blachly*, 1 Johns. Ch. Rep. 607-667.

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CORNELIUS McCLEAN v. THOMAS PLUMSELL.

An insolvent debtor, found guilty upon allegations filed under the 7th section of the insolvent act of the District of Columbia, will not be ordered into close custody if he is out upon a prison-bounds bond.

ALLEGATIONS were filed by C. McClean, a creditor, against Thomas Plumsell, a petitioner for the benefit of the "Act for the relief of insolvent debtors within the District of Columbia," upon which he was found guilty.

Mr. Morfit, for the creditor, prayed that the debtor might be committed to close custody, although he was out upon a prison-bounds bond.

But the COURT refused, and directed that the entry of the judgment of the Court be, "that the said Thomas Plumsell be precluded from any benefit under the act," &c., according to the precedent in *Walter Newton's case*, at April term, 1824. [2 Cranch, C. C. 467.]

See the case of *Keirll v. McIntire*, at May term, 1826, [2 Cranch, C. C. 670,] and *Fitzgerald's case*, at this term, [*post*, 90.]

 BANK OF WASHINGTON v. BANK OF THE UNITED STATES.

Money paid upon an erroneous judgment, may, after reversal of the judgment, be recovered back in an action for money had and received; and if the money shall have been paid to an agent of the original plaintiff, and remains in his hands, at the time of reversal and demand, it may be recovered of the agent.

If the amount of the judgment be paid to the plaintiff's agent, and he be notified, at the same time, that a writ of error will be taken out to reverse the judgment, and that he will be expected to refund it if the judgment should be reversed, if he then pay over the money to his principal, without security for his indemnity, it is at his own peril.

ASSUMPSIT for money had and received to the plaintiff's use, to recover back money paid upon an erroneous judgment.

The case was argued by *Mr. Key* and *Mr. J. Dunlop*, for the plaintiffs, and by *Mr. Jones* and *Mr. Lear*, for the defendants.

The counsel for the plaintiffs cited *Ripley v. Gelston*, 9 Johns. 201; *Burrough v. Skinner*, 5 Burr. 2639; 1 Chitty's Pleadings, 25; Esp. N. P. 6, 19; *Frary v. Dakin*, 7 Johns. 79.

CRANCH, C. J., delivered the opinion of the Court.

This is an action brought January 12, 1830, to recover money paid by the plaintiffs to the defendants, upon a judgment of the Circuit Court, which has been since reversed by the Supreme Court of the United States.

The state of the case, as agreed by the parties, is this: "Triplett and Neale recovered a judgment in this Court, at Alexandria, in April term, 1824, against the Bank of Washington, which was afterwards reversed in the Supreme Court. The Bank of Washington, on the 2d of June, 1824, applied to one of the judges of the Supreme Court, to allow a writ of error to be prosecuted, (the matter in dispute being less than \$1,000, so that the bank could not, of right, obtain a writ of error without the special leave of one of the judges of that court.)

That judge did not allow the writ; but it was, afterwards, to wit, on the 15th of March, 1825, allowed by the chief justice. After the refusal of the writ, upon the first application, and before its allowance by the chief justice, to wit, on the 30th of August, 1824, Triplett and Neale sued out their execution on the judgment, and immediately sent the same, inclosed in a letter, to Richard Smith, cashier of the Office of Discount and Deposit of the Bank of the United States, at Washington, with an indorsement thereon, in these words: "Triplett and Neale v. The Bank of Washington, 1824. Use and benefit of the Office of Discount and Deposit, United States, Washington city. Charles Neale."

That the said Richard Smith wrote an indorsement thereon, in these words: "Pay to Mr. Brooke Mackall. Richard Smith, cashier."

That the said Brooke Mackall, the runner in the said office, presented the execution, &c. to the Bank of Washington, and there, on the 9th of September, 1824, received the sum of \$881.18, and signed the receipt thereon, in these words: "Received eight hundred and eighty-one dollars and eighteen cents. B. Mackall." And, at the time of signing the same, William A. Bradley, then cashier of the Bank of Washington, verbally gave notice to the said Mackall, that it was the intention of the said Bank of Washington to appeal to the Supreme Court, and that the said Office of Discount and Deposit would be expected, in case of a reversal of the judgment, to refund the amount. That the said Mackall received the said sum, as the amount of principal and interest accrued on the said judgment, as appears by his receipt on the said execution; which sum he delivered to the said Smith, who entered it to the credit of C. Neale, one of the firm of Triplett & Neale, on the proper books of the said office.

That before delivery of the said execution to the said Smith, as aforesaid, the said C. Neale had promised to appropriate the money, expected to be recovered from the Bank of Washington in that suit, to reduce certain accommodation discounts which he, the said Neale, had running in the said bank, upon notes drawn

by him, and indorsed by indorsers as sureties for the due payment thereof, which discounts were still running upon such notes at the time and times the said execution was so delivered, and when the money was paid as aforesaid. That he, said Smith, received the said execution, with the said Neale's said indorsement thereon, as he understood and considered, for collection; and, when collected, he deposited the same in bank, to the said Neale's credit generally, and would have sent the same to him at Alexandria, if he had requested him to do so; and would have paid his check for the amount.

That immediately upon the receipt of the said money, as aforesaid, the said Smith wrote a letter to the said Neale, in the words following:

"Office Bank United States, }
Washington, September 9th, 1824. }

"Christopher Neale, Esq. Dear Sir,—I have received the sum of eight hundred and eighty-one dollars and $\frac{18}{100}$ cents from the Bank of Washington, in payment of your judgment against it, and have placed the same to your credit. Be good enough to give me specific directions of the way in which you wish it applied.

Yours, respectfully, RICHARD SMITH, *Cashier*."

To which letter the said C. Neale returned the following answer:

"Dear Sir,—In reply to your esteemed favor, I have to request that you will apply the money received from the Bank of Washington to the reduction of the notes indorsed by John H. Ladd & Co. and John A. Stewart, equally, after paying Thomas Swann and Walter Jones, Esq., \$100 between them, or \$50 each, as their fees. Yours, truly, CHRISTOPHER NEALE.

September 10, 1824."

That the said Smith applied the said money pursuant to the directions of the last-mentioned letter.

It is submitted to the Court, upon the foregoing case agreed, whether the plaintiffs are entitled to recover of the defendants, the money, with interest, so received and applied by the said Smith as aforesaid.

If the Court decide in the affirmative, judgment to be entered for the plaintiffs for the sum of \$881.18, with interest from the 9th day of September, 1824, till paid, and costs; otherwise for the defendants, with costs. (Any objections to the competency of the evidence as here stated, to be considered by the Court.)

N. B. The plaintiff also shows the record of the final trial at Alexandria Court of November term, 1829, and it is to be considered as here inserted.

W. Jones, for defendants. F. S. Key, for plaintiffs.

There can be no doubt that the money paid upon an erroneous judgment, may, after reversal of the judgment, be recovered back in an action for money had and received. And if the money shall have been paid to an agent of the original plaintiff, and remains in his hands, at the time of reversal and demand, it may be so recovered of the agent.

In all the cases in the books, where money paid by mistake, has been paid to an agent, and he has had notice of the mistake before he has, *bonâ fide*, paid it over to his principal, he has been held liable to refund it.

We do not perceive any difference, in principle, between the case of money paid by mistake, and money paid upon an erroneous judgment. If the assignee of an erroneous judgment is the absolute owner of it by purchase, without recourse to the assignor, and receives the amount from the defendant, he receives it as principal; and upon reversal of the judgment, is as much liable to refund it to the defendant, as if he had been the original plaintiff in the action, whether he had or had not notice, at the time of receiving it, that the original defendant intended to prosecute a writ of error. If he received the money as agent, and, at the time of receiving it, had such notice, he is put upon his guard; and, if he pays over the money to his principal, without security for his indemnity, it is at his own peril; for the notice makes him liable to refund it to the original defendant in case the judgment should be reversed.

In the present case, the notice accompanied the payment. If Mr. Mackall was competent to receive the money, he was competent to receive the notice.

It was sufficient for the Bank of Washington that the notice should accompany the payment. They could not tell, beforehand, who would demand payment of the judgment. They could not, therefore, give any previous notice to the bank. It is true that they might have given notice to Triplett & Neale, the original plaintiffs; but they were not bound to give it. It was sufficient for them to wait until payment should be demanded. We think that the notice to Mr. Mackall, the agent of the Bank of the United States, placed that bank on the same ground of liability as that upon which the original plaintiffs stood; and that they are equally bound to refund the money, upon the reversal of the original judgment.

THURSTON, J. absent, but understood as agreeing in the result of this opinion.

Reversed by the Supreme Court. 6 Peters, 8.

ECKLE *et al.* v. FITZGERALD.

What allegations are sufficient to prevent a discharge under the insolvent act of the District of Columbia.

Upon a verdict against the petitioner, he will not be ordered into close custody, if he is out upon a prison-bonds bond.

FITZGERALD petitioned the chief judge for a discharge under the insolvent law of the District of Columbia.

Eckle and others, his creditors, opposed his discharge, and filed two allegations :

1. That he disposed of certain property (specified) with intent to defraud his creditors, by selling the same, and withholding the same from his creditors, and applying the proceeds to his own use.

2. That he disposed of the same property, with intent to defraud his creditors by secreting the same.

The COURT (THRUSTON, J. absent,) was of opinion that the allegations were sufficient.

Verdict. Guilty.

The Court made the same order as in *Plumsell's case*, at this term, [*ante*, 86.]

CHASE v. SMITH.

Although an appeal will not lie to the judgment of a justice of the peace upon a verdict of a jury, yet, if the defendant does, in fact, appeal and give an appeal-bond, the plaintiff may maintain an action upon that bond.

DEBT on an appeal-bond given upon an appeal from the judgment of a justice of the peace, upon the verdict of a jury.

The declaration set forth the condition of the bond, which was in the usual form, except that it stated that the judgment was rendered upon the verdict of a jury before the justice.

The breach assigned was the not prosecuting the appeal with effect ; and not satisfying the judgment of the justice.

Mr. Z. C. Lee, for the defendant, demurred to the declaration, without oyer of the bond ; contending, that inasmuch as the condition of the bond, set out in the declaration, showed that the judgment was upon a verdict before the justice of the peace ; and as this Court, upon the appeal in the same case, decided that this Court had not jurisdiction by appeal where the judgment of the justice was upon a verdict, the bond was void.

But the COURT overruled the demurrer.

Corporation of Georgetown v. Smith.

CORPORATION OF GEORGETOWN v. CLEMENT SMITH.

A person residing, or having real estate, in Georgetown, is bound to take notice of the charter and by-laws. A person, indebted for taxes on real estate in Georgetown, and availing himself of the benefit of the ordinance of June 15, 1822, by giving his notes therefore, creates an equitable lien on the real estate, of which a purchaser is bound to take notice, and is liable to pay the taxes with interest in the manner as the vendor was bound.

A purchaser, at a sale under judgment and execution, takes only the right of the debtor at the time of the judgment. A judgment at law does not overreach a prior equity of a third person, *bonâ fide* acquired for valuable consideration.

THIS case was submitted by the parties to CRANCH, C. J. (THRUSTON, J. absent, and MØRSELL, J. being an inhabitant of, and owning real estate in, Georgetown, declined giving an opinion.)

CRANCH, C. J. delivered the following opinion :

Mr. John Threlkeld being indebted to the Corporation of Georgetown for taxes due on real estate in that town for the years 1816, 1817, 1818, and 1819, gave his promissory notes for the amount thereof, to the corporation, at six, twelve, and eighteen months from the 15th of September, 1822, in the following form :

“Georgetown, September 16, 1822.

“I assent to the provisions of the ordinance providing for the settlement of all arrears of taxes due prior to the year 1820, passed the 15th day of June, 1822 ; and, six months after date hereof, I promise to pay to the mayor, recorder, aldermen, and common council of the Corporation of Georgetown, or their order, one hundred and fifty-two dollars and thirty-one cents, with legal interest thereon from this date, being one third of the amount of taxes due by me on real and personal property for the years 1816, 1817, 1818, and 1819.

JOHN THRELKELD.”

Two similar notes were given for the like amount, payable in twelve and eighteen months.

By the ordinance of the 15th of June, 1822, the late collector is “authorized to receive from any persons, in arrears for taxes due the corporation, to the year 1820, the amount of such arrears in promissory notes, payable in six, twelve, and eighteen months, bearing interest at the rate of six per cent. per annum, which are hereby understood and declared to be secured by the property which is now bound for the payment of the taxes.”

The collector is also required to pay over to the clerk of the corporation, monthly, all such notes as may be by him received for the taxes aforesaid, in lieu of money. And it is further ordained that where persons do not avail themselves of the indulgence, thereby allowed, by passing their notes to the collector within three months from the date of the ordinance, he be directed

Corporation of Georgetown v. Smith.

to collect the taxes due, by sale of the property, first giving the usual notice.

Mr. Threlkeld remained owner in fee of the property till the year 1828, when it was sold under an execution against him at the suit of Clement Smith, the defendant in this cause, who became the purchaser thereof, and received a deed from the marshal.

The notes given by Mr. Threlkeld remain unpaid. In 1824, (May 26th,) the charter of Georgetown was amended by the "Act supplementary to the act to incorporate the inhabitants of the city of Washington, passed the 15th of May, 1820, and for other purposes;" [4 Stat. at Large, 75;] the seventh section of which provides for the notice, to be given, of the sales of real property in Georgetown, chargeable with taxes. The eighth section authorizes the sale of the real property where the owner or tenant has not sufficient personal estate out of which to enforce the collection of the debt due; and where he has personal property, it may be distrained and sold to pay the taxes. The tenth section provides, "that where any person without notice of the outstanding taxes, has made a *bonâ fide* purchase from the legal owner of any real estate, previous to the 15th of May, 1824, the said real estate so acquired, shall not be liable for taxes due and owing previous to said purchase."

The liability of Mr. Smith to pay the taxes charged, is admitted, but he denies his liability for the interest; and this question is submitted.

It is contended on the part of Mr. Smith, that the property is not liable for interest on the taxes, unless it is made so by the agreement of Mr. Threlkeld and the ordinance of June 15, 1822; that such an agreement could only have created an equitable lien, which could only have been enforced against the property in the hands of Mr. Threlkeld, or in the hands of a purchaser with notice; that it cannot be enforced in the hands of Mr. Smith, because he is a *bonâ fide* purchaser of the legal estate, for a valuable consideration, without notice of such equitable lien.

On the part of the corporation it was contended, that Mr. Smith is a purchaser with notice and therefore bound to pay the interest; that the taxes were a legal incumbrance on the property, and that he was bound to take notice of them at his peril; that in order to ascertain the amount of the taxes, he must necessarily apply, for information, to the clerk of the corporation who keeps the tax-books, and the notes given for taxes, and who would have informed him of the notes given by Mr. Threlkeld, and of his agreement to the terms of the ordinance of the 15th of June, 1822, which declares that the notes were to be secured by the property then bound for the payment of the taxes; that it was,

therefore, immaterial whether or not Mr. Smith had actual notice of the notes and agreement; for he was bound to take notice of that which would have led him to a knowledge of them; and, therefore, cannot protect himself under the plea that he was a purchaser without notice. It is also contended, that Mr. Smith, being a purchaser at the marshal's sale under a judgment and execution, acquired only the right of Mr. Threlkeld, whose right was subject to the lien for the payment of the notes; that although he took the legal estate, he took it subject to all the liens, equitable as well as legal, charged upon it by Mr. Threlkeld. And in support of this position, the case of *Hampson v. Edelin*, 2 Harr. & Johns. 66, was cited, where the Court of Appeals of Maryland, upon a bill in equity filed by the vendee, affirmed the decree of the chancellor for a perpetual injunction, prohibiting a creditor of the vendor and the sheriff from selling the estate under a *fi. fa.* issued upon a judgment obtained against the vendor, after the sale and payment of part of the purchase-money, and after possession given to the vendee, but before the payment of the balance, which, however, was paid by the vendee, and a deed of conveyance from the vendor to the vendee, was duly executed and delivered, before the issuing of the *fieri facias*. In that case, the Court of Appeals of Maryland did not go upon the ground of notice, but upon the ground that the creditor did not, by the judgment, acquire a legal estate in the land; and that a judgment obtained by a third person against the vendor, between the contract and the payment of the money, cannot defeat or impair the equitable interest acquired by the vendee, who, from the time of the contract, is a *cestui que trust*. Therefore it is contended that, either on the ground that Mr. Smith is a purchaser with notice of the equitable lien of the corporation, or on the ground that a judgment at law will not overreach a prior equity of a third person, *bonâ fide* acquired, for a valuable consideration, the corporation has a prior equitable lien which a court of equity will protect and enforce.

It seems to me that the right of the corporation is strong upon both grounds.

Mr. Smith, whether he actually resided within the town or not, was bound to notice all the ordinances of the corporation affecting his real estate within the town. He was bound to know that the property was liable for taxes not paid. Upon the purchase of the real estate in question, he was, at his peril, to ascertain what taxes were due upon it. Upon inquiry at the proper office for that information, he would be informed that Mr. Threlkeld had accepted the terms offered by the ordinance of June 15, 1822, (of which also he was bound to take notice,) that he had given his notes

agreeably to those terms, and that he had thereby bound the property as security for the payment of them.

Mr. Smith is presumed to have done what every prudent man would do in a like case ; and if he did not do it, he must abide the consequences.

His knowledge that the property was liable for the taxes, unless they had been paid, was sufficient to put him upon the inquiry which, if properly pursued, would have led him to the knowledge of the equitable lien created by Mr. Threlkeld for the payment of the interest.

I think, therefore, that he cannot be considered as a purchaser of the legal estate without notice.

But if that view of the subject is not correct, it seems to me that the case comes within the principle decided by the Court of Appeals of Maryland, in the case of *Hampson v. Edelin*, 2 Harr. & Johns. 66.

The principle of that case, as I understand it, is this : That a judgment at law, against a debtor, binds only the interest of the debtor in the lands. That by a contract of sale, for valuable consideration, the vendee is in equity the owner of the land, from the time of the contract, although the money be not paid at the time, and the vendor becomes a trustee for the vendee. That when the money is paid, the vendee is entitled to a conveyance and to a decree for a specific performance of the contract, if such conveyance is refused. That a judgment at law by a third person, against a mere trustee without interest, does not bind the trust estate so as to enable the creditor to make his debt out of it by execution. Or, in other words, that a court of equity will always protect a fair equitable prior title, against a judgment at law against a person who holds the mere legal estate.

It is not material whether the equitable interest to be protected extends to the whole of the subject, or not ; so far as it extends it is entitled to protection.

The date of the judgment under which this property was sold is not stated in the case agreed ; but as all the notes had become payable in December, 1823, and the property was not sold under the execution until 1828, I infer that the judgment was rendered after all the notes had become payable, and the corporation had a right to enforce their lien by a sale of the property under a decree of a court of equity.

Here, then, was a clear, vested, equitable interest which, according to the case of *Hampson v. Edelin*, cannot be defeated or impaired by the judgment.

In that case, indeed, it may be said that there was no actual sale ; it was prevented by the injunction.

But in the present case, Mr. Smith, the purchaser, was the creditor at whose suit the judgment was rendered, under which the sale was made; and if it would have been inequitable in him to proceed to sell under the judgment, it must be, at least, as inequitable in him to purchase under the judgment. And as, according to the principle of the case of *Hampson v. Edelin*, he ought to have been restrained from selling, so, upon the same principle, he ought to be prohibited from availing himself of his purchase to the prejudice of the corporation.

I am, therefore, of opinion, upon both the grounds relied upon by the counsel of the corporation, that it is entitled to avail itself of its lien upon the property, by a decree in equity; and that, therefore, Mr. Smith, as purchaser of the property, is liable for the interest due upon that part of Mr. Thelkeld's notes which consists of the taxes upon the property purchased by Mr. Smith; which interest, according to the account stated (marked A.) amounted on the 1st of August, 1830, to \$73.94.

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1830, AT ALEXANDRIA.

FRANCES ALEXANDER'S ADMINISTRATOR *v.* WILSON C. SELDEN
et al., heirs of Charles Alexander, Senior.

If the husband does not die seized, the widow is no more entitled to damages in equity for the non-assignment of her dower, than she is at law.

BILL IN EQUITY by the administrator of the widow Frances Alexander, against the heirs at law of her husband for an account of the rents and profits of her dower, from the time of demand, until her death.

Her husband in his lifetime had conveyed the lands to his son, Charles Alexander. Mrs. Alexander died in 1823.

Mr. Hewitt, for the plaintiff, cited *Curtis v. Curtis*, 2 Bro. C. C. 620, and contended that the plaintiff might recover damages in equity, even if she could not at law.

Mr. Taylor, contra. By the statute of Merton, the widow is not entitled to damages unless her husband died seized; but here her husband had in his lifetime conveyed the estate to his son; so that the husband did not die seized. Co. Lit. 32 *b*; Dyer, 284 *a*; *Embree v. Ellis*, 2 Johns. 124, 484; *Shaw v. White*, 13 Johns. 179; Virginia Law, December 7, 1792, p. 170, § 4.

Mr. Hewitt, for the complainant, cited *Herbert v. Wren*, 7 Cranch, 370; *Mundy v. Mundy*, 2 Ves. Jr. 122; 1 Thomas Coke, 588, note; and contended, that courts of equity are not confined to the legal right of dower, but may give the same damages from the time of demand of dower, where the husband did not die seized, as the statute of Merton gives where the husband died seized.

The COURT (THRUSTON, J., absent,) was of opinion that damages cannot be given in equity which could not be recovered at law.

JOHN C. VOWELL v. EBENEZER BACON.

A master of a vessel has no lien for his wages, on goods consigned to his owners.

TROVER, by the assignee of a bill of lading given by the defendant as master of the brig Numa, for sundry bags of money consigned to the owners of the brig.

The facts appeared to be, that J. & J. Harper, owners of the brig Numa, Ebenezer Bacon, master, shipped a cargo at Alexandria on board the brig, consigned to S. D. Harper, their supercargo. After this shipment and before the return of the brig, J. & J. Harper failed, and assigned this outward cargo to the plaintiff, John C. Vowell, for valuable consideration, and assigned to the plaintiff the bills of lading of the return cargo.

The defendant, the master of the brig, refused to deliver up the bags of money unless the plaintiff would pay him his wages due by J. & J. Harper, and others, his owners.

Mr. Hodgson and *Mr. Mason*, for the defendant, contended that he had a right to do so, and cited *Downam v. Matthews*, Prec. in Ch. 580, and *Godin v. London Ass. Co.* 1 Burr. 489.

Mr. Taylor, contra. A master of a vessel has no general lien upon the consignments to his owners for a general balance of account due to him by them. There is no special lien; no advance upon the faith of those consignments. He was a common carrier. He was not intrusted with the property, except as a mere common carrier. A general balance of account cannot be set off in trover for specific goods.

J. & J. Harper had complete control over the outward cargo in the hands of S. D. Harper, their supercargo and consignee, and they assigned to the plaintiff for valuable consideration, who thereby acquired the legal title. The consignment to S. D. Harper did not transfer the legal title to him. It only gave him a power to sell as the factor of J. & J. Harper. But it is unimportant whether the assignment of the outward bill of lading gave the plaintiff a legal title; he had an equitable right to it, and could have compelled the factor, S. D. Harper, to account for the proceeds, and if the legal title remained in J. & J. Harper they transferred it to the plaintiff.

The COURT (*nem. con.*) was of opinion and so instructed the jury, at the prayer of the plaintiff's counsel, that the defendant had no right to detain the bags of money, against his bill of lading, for a balance of general account due to him by the owners of the vessel, who had assigned the bill of lading to the plaintiff for a valuable consideration.

Verdict for the plaintiff, \$1137.75, with interest from the 24th of December, 1827.

 United States v. Askins.

KOUNSALAER v. CLARKE.

Change of *venue*, in civil actions.

THIS cause had been transferred from Washington to this county, under the Act of Congress of June 24th, 1812, § 8, [2 Stat. at Large, 755,] at the last term.

Mr. R. S. Coxe, for the defendant, moved for a rule on the plaintiff to show cause, on the first day of the next term at Washington, why the order for transferring this cause from Washington to this county should not be rescinded; it not having been made upon such affidavits as are required by the rule of court made in May term, 1821, at Alexandria.

The COURT (*nem. con.*) refused to lay the rule.

Mr. Key, for the plaintiff.

 UNITED STATES v. ASKINS.

The Court will not order the forfeiture of a recognizance, in a criminal case, to be rescinded, and permit the defendant's counsel to move in arrest of judgment, without the personal appearance of the defendant.

Biting off an ear is not within the Virginia Act of December 17, 1792, to prevent malicious disfiguring.

INDICTMENT for biting off the ear of John Taylor, with intent to disfigure him. Verdict, guilty. The defendant was called, and not appearing, his recognizance was forfeited at the present term.

Mr. Hewitt, for the defendant, moved the Court to strike out the forfeiture, and permit him to move in arrest of judgment.

Mr. Swann, United States Attorney, objected that it could not be done without the defendant's personal appearance.

The COURT (THRUSTON, J., absent,) was of that opinion, and overruled the motion.

The defendant having personally appeared, his counsel, *Mr. Hewitt*, was permitted to move in arrest of judgment.

The indictment purports to be under the Virginia statute of 17 December, 1792, "to prevent malicious shooting," &c., by which it is enacted, that if any person "shall unlawfully cut out or disable the tongue, put out an eye, slit a nose, bite, or cut off a nose, or lip, or cut off or disable any limb or member of any person whatsoever, within the Commonwealth, with intent, in so doing, to maim or disfigure, in any of the manners before men-

Negroes Simon and Lewis v. Paine's Administrator.

tioned, such person; the person or persons, so offending," &c., "shall be and are hereby declared to be felons, and shall suffer as in case of felony."

Mr. Hewitt, for the defendant, cited 6 Bac. Ab. 181, 182, 384; Act of Congress of April 30, 1790, § 13, [1 Stat. at Large, 112,] by which it is enacted, that if any person, within the sole and exclusive jurisdiction of the United States, "on purpose, and of malice aforethought, shall unlawfully cut off the ear or ears, or cut out or disable the tongue," &c., he shall be imprisoned, &c., and fined, &c.

The present indictment is not under that act, for it does not charge the malice aforethought, nor that the defendant cut off the ear.

There is a difference between cutting and biting. The former shows a previous intention, biting does not.

If the Virginia Act of 1792 includes the ear, there was no necessity of the Act of 1802, which expressly provides for the biting off an ear when done maliciously and of malice aforethought. 4 Tuck. Bl. 207.

The COURT (*nem. con.*) was of opinion, that the offence, as stated in the indictment, was not within the Virginia Act of 1792, p. 178. And CRANCH, C. J., thought that biting could not be called cutting; that an ear cannot be "disabled" within the meaning of the statute; nor is the ear such a member as was intended by the statute, which had enumerated the tongue, the eye, the nose, and lip.

 NEGROES SIMON AND LEWIS v. PAINE'S ADMINISTRATOR.

Slaves escaping from Maryland and suing here for their freedom, will not be delivered up to the person claiming to be their owner, upon security to return them to Maryland; their claim for freedom having arisen here, and their witnesses residing here.

THIS was a suit for freedom, docketed this term by an order of the Court made *ex parte*.

Mr. Taylor, for the defendant, moved the Court to rescind the order, upon bond and security to take the negroes back to Maryland, from whence they escaped into this district, and gave themselves up to the magistrate, and prayed leave to sue *in forma pauperis*.

Mr. Mason, contra. Their right to freedom arose under the laws here.

The COURT (THRUSTON, J., absent,) refused to rescind the order.

The cause was tried, and the jury found a verdict for the plaintiffs, upon the ground that they had been brought here by their master and kept here more than a year.

Nutt v. Mechanics Bank and Smith.

his principal before notice of the plaintiff's claim, except the sum of \$410.01, which he has paid to the plaintiff, with the assent of the other parties.

Having been of opinion, in the preceding case of *Vowell v. West*, that West had a right to retain so much of the proceeds of the cargo as would cover the debt of the Harpers to him, it follows, that, as he has accounted to them for the residue, he has now nothing more in his hands, and the bill, as to him, must be dismissed.

Bill dismissed as to the defendant West.

JEMIMA NUTT v. MECHANICS BANK AND JOSEPH SMITH.

Dower will be assigned in equity, where there has been a parol partition by tenants in common, and damages will be awarded from the time of the demand, if the husband died seized.

BILL IN EQUITY for dower in certain lots in Alexandria, conveyed in fee to Nutt and Anderson, as tenants in common, subject to a ground rent, and conveyed by Nutt and Anderson to R. J. Taylor, in trust, to secure debts due by them to the Mechanics Bank, and to Joseph Smith, and sold by R. J. Taylor, the trustee, to the bank. The bill seeks for damages, from the time of the sale to the bank. Anderson and Nutt were partners in merchandise, and this property was purchased with their joint funds. They divided their joint property, but no legal conveyance or deeds of partition were made of the real estate.

Mr. Hewitt and *Mr. Swann*. A parol partition by tenants in common, is valid.

Mr. Neale. The husband died seized. The rent charge granted by the husband did not deprive him of his seizin.

Decree. Dower to be assigned, and referred to master commissioner to take an account of the damages from the commencement of this suit to the time of taking the account.

CIRCUIT COURT OF THE UNITED STATES.

DECEMBER TERM, 1830, AT WASHINGTON.

CORPORATION OF WASHINGTON v. AZARIAH COOLY.

A warrant upon the by-law of the city of Washington, of January 12, 1830, § 1, for setting up a faro-table, must state it to be "for the purpose of gaming for money."

APPEAL from the judgment of a justice of the peace for a fine of \$50 for setting up "a table called faro, upon which cards were played."

Mr. Coxe, for the defendant, objected that the warrant did not charge any offence under the by-law, because the purpose or intent of setting up the table is not stated therein. The words of the by-law are, that "no E. O. A. B. C., L. S. D., faro, rolly-bolly, shuffle-board, equality-table, or other device, to be used with cards, balls, dice, coin, or money, or any other game of hazard, (except the game of billiards, upon licensed billiard-tables,) for the purpose of playing or gaming for money, or any thing in lieu thereof, shall be set up, kept, or exhibited in any part of this city, under the penalty of fifty dollars for every day," &c.

Mr. Ashton, contra. The justice of the peace is to proceed according to the right and equity of the matter; and the Court is not to regard mere matter of form.

The intent may be inferred from the use actually made of it. If the intent had been alleged in the warrant, and he could disprove that intent, he would be acquitted. The words, "for the purpose of gaming for money," are only applicable to the words "or any other device," and not to the word "faro," the setting up of which is prohibited, although not set up with any such intent.

The COURT, upon motion, (THRUSTON, J., absent,) quashed the warrant, because it did not set forth the intent which constitutes an essential part of the offence, under the by-law.

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his principal before notice of the plaintiff's claim, except the sum of \$410.01, which he has paid to the plaintiff, with the assent of the other parties.

Having been of opinion, in the preceding case of *Vowell v. West*, that West had a right to retain so much of the proceeds of the cargo as would cover the debt of the Harpers to him, it follows, that, as he has accounted to them for the residue, he has now nothing more in his hands, and the bill, as to him, must be dismissed.

Bill dismissed as to the defendant West.

JEMIMA NUTT v. MECHANICS BANK AND JOSEPH SMITH.

Dower will be assigned in equity, where there has been a parol partition by tenants in common, and damages will be awarded from the time of the demand, if the husband died seized.

BILL IN EQUITY for dower in certain lots in Alexandria, conveyed in fee to Nutt and Anderson, as tenants in common, subject to a ground rent, and conveyed by Nutt and Anderson to R. J. Taylor, in trust, to secure debts due by them to the Mechanics Bank, and to Joseph Smith, and sold by R. J. Taylor, the trustee, to the bank. The bill seeks for damages, from the time of the sale to the bank. Anderson and Nutt were partners in merchandise, and this property was purchased with their joint funds. They divided their joint property, but no legal conveyance or deeds of partition were made of the real estate.

Mr. Hewitt and Mr. Swann. A parol partition by tenants in common, is valid.

Mr. Neale. The husband died seized. The rent charge granted by the husband did not deprive him of his seizin.

Decree. Dower to be assigned, and referred to master commissioner to take an account of the damages from the commencement of this suit to the time of taking the account.

CIRCUIT COURT OF THE UNITED STATES.

DECEMBER TERM, 1830, AT WASHINGTON.

CORPORATION OF WASHINGTON *v.* AZARIAH COOLY.

A warrant upon the by-law of the city of Washington, of January 12, 1830, § 1, for setting up a faro-table, must state it to be "for the purpose of gaming for money."

APPEAL from the judgment of a justice of the peace for a fine of \$50 for setting up "a table called faro, upon which cards were played."

Mr. Coxe, for the defendant, objected that the warrant did not charge any offence under the by-law, because the purpose or intent of setting up the table is not stated therein. The words of the by-law are, that "no E. O. A. B. C., L. S. D., faro, rolly-bolly, shuffle-board, equality-table, or other device, to be used with cards, balls, dice, coin, or money, or any other game of hazard, (except the game of billiards, upon licensed billiard-tables,) for the purpose of playing or gaming for money, or any thing in lieu thereof, shall be set up, kept, or exhibited in any part of this city, under the penalty of fifty dollars for every day," &c.

Mr. Ashton, contra. The justice of the peace is to proceed according to the right and equity of the matter; and the Court is not to regard mere matter of form.

The intent may be inferred from the use actually made of it. If the intent had been alleged in the warrant, and he could disprove that intent, he would be acquitted. The words, "for the purpose of gaming for money," are only applicable to the words "or any other device," and not to the word "faro," the setting up of which is prohibited, although not set up with any such intent.

The COURT, upon motion, (THRUSTON, J., absent,) quashed the warrant, because it did not set forth the intent which constitutes an essential part of the offence, under the by-law.

Reynolds v. Baker.

UNITED STATES v. HENRY MILLER.

Evidence of the declaration of another person, that he was the guilty person, cannot be given.

Evidence that the defendant dealt the cards, at faro, is *primâ facie* evidence that he kept the house.

INDICTMENT for a nuisance in keeping a public gaming-house.

Mr. Coxe and *Mr. Dandridge*, for the defendant, offered evidence of the declaration of another person, that he was the keeper of the house and gaming-table.

The United States Attorney objected, and the Court refused to receive the evidence.

The COURT, also, (CRANCH, C. J., absent,) instructed the jury that dealing the cards, as keeper of the faro-table, was *primâ facie* evidence that such dealer was the keeper of the house.

UNITED STATES v. JAMES M'CORMICK.

Upon an indictment for keeping a public gaming-house, the day laid in the indictment is not material, so that it is within the time of limitation, and not within the time of a previous conviction or acquittal. All the acts of keeping such a house before finding the indictment constitute but one offence.

INDICTMENT, for a nuisance in keeping a public gaming-house from April 10, to June 10, 1829.

The COURT (*nem. con.*) permitted the United States to give evidence of acts done before the 10th of April, considering the day not material, so that it was within the time of limitation, and not within the time of a previous conviction or acquittal; all the acts of gambling, and keeping a gaming-house, previous to the finding of the indictment, constituting but one offence.

MATTHEW REYNOLDS v. JOHN W. BAKER.

Upon the general issue in trespass *quare clausum fregit*, where the plaintiff relies upon possession without title, it is competent for the defendant to show, by evidence, that the close which he broke was not the plaintiff's close.

TRESPASS *quare clausum fregit*.

Upon the general issue the defendant, by his counsel, *Mr. Redin*, offered evidence to show a condemnation of the land for the Chesapeake and Ohio Canal, and a deed from *Mrs. Mayfield*

United States v. Evans.

to the Canal Company, and that the defendant entered under their authority.

Mr. Ashton, for the plaintiff, objected that it was *res inter alios acta*, but showed no title in the plaintiff. The defendant cannot justify under the general issue. 2 Saund. Pleading, 443.

Mr. Redin, contra, cited 1 Chitty, 492; *Hyat v. Wood*, 4 Johns. 150; 2 Phil. on Ev. 137; Bul. N. P. 90.

The COURT permitted the condemnation and deed to be given in evidence.

The plaintiff then showed his possession, and that the defendant, by his servants, entered the house and threw out the plaintiff's goods.

Mr. Ashton, for the plaintiff, contended that this was all he was bound to prove, and the general issue only denies what the plaintiff has alleged in his declaration. If the defendant relies upon any thing else than the facts alleged by the plaintiff, it must be specially pleaded.

The COURT (*nem. con.*) said, that any matter which tended to show that it was not the plaintiff's close, may be given in evidence under the general issue. The plaintiff's possession is evidence of his title against all the world but him who has a better title; and if the defendant shows a better title in himself, he shows that he did not break the plaintiff's close. The defendant, therefore, may show title in Mrs. Mayfield, or the Canal Company, under whose authority the defendant claimed to enter.

Verdict for plaintiff, \$50.

UNITED STATES v. EVANS.

The penalty for keeping a faro-table in a place occupied as a tavern, contrary to the Maryland Act of 1797, c. 110, may be recovered by indictment.

THE defendant was convicted upon an indictment for keeping a faro-table at a place occupied as a tavern, contrary to the Maryland Act of 1797, c. 110.

Mr. Dandridge, for the defendant, moved in arrest of judgment, and contended that the verdict does not authorize the Court to give judgment for the penalty; but only creates a cause of action in favor of any one who will sue upon that verdict for the penalty. The second section of that act says, "on pain of forfeiting, for every offence, the sum of fifty pounds, upon conviction thereof by indictment or confession in the county court."

The fifth section says, that "one moiety of the forfeiture accruing or becoming due under this act, shall be applied to the use

of the county, and the other moiety to the person or persons who shall sue for the same."

By the Act of Congress of the 3d of March, 1801, [2 Stat. at Large, 115,] Burch's Dig. 233, it is enacted, "that all fines, penalties, and forfeitures, accruing under the laws of the States of Maryland and Virginia, which by adoption have become the laws of this district, shall be recovered, with costs, by indictment, or information in the name of the United States, or by action of debt in the name of the United States and of the informer; one half of which fines shall accrue to the United States, and the other half to the informer," &c.

Mr. Dandridge, cited *The Commonwealth v. Richards*, Virginia Cases, 133, in which case it was decided, by the general court, that the forfeiture of \$150, declared by the Act of 1797, c. 2, § 3, cannot be recovered for the use of the Commonwealth by information; the forfeiture being given "to the person who will sue for the same." *Rex v. Luckup*, 2 Strange, 1048, that upon a conviction under the 9 Anne, c. 14, for cheating at play, the Court could not give judgment for five times the value of the thing won; the act having provided that the penalty should be recovered by action "by such person as will sue for the same." Stat. 30, Geo. 1, c. 24.

The COURT (THRUSTON, J., absent,) overruled the motion in arrest of judgment; because the forfeiture accrues upon the conviction, and the conviction is to be by indictment, according to the express words of the Act of Maryland of 1797, c. 110, as well as by the Act of Congress of the 3d of March, 1801, [2 Stat. at Large, 115.] No other mode of recovering the penalty is given by either of those statutes; and the practice has been, uniformly, both in Maryland and in this district, to render judgment for the penalty, upon conviction upon indictment under that statute.

The counsel for the defendant contended, that, as half of the penalty was, by the statute of Maryland, to be applied to the use of the county, and the other half to the person who should prosecute and sue for the same; the penalty could only be recovered by an action of debt by the informer and the United States.

But the statutes upon which the cases which were cited by the defendant's counsel, were decided, prescribed the mode of recovery to be by any person who will sue for the same. Such is also the provision of the Test Act, 25 c. 2, ch. 2, § 5, upon which the information was founded in the case of *Story v. Pleasaunce*, 1 Lutw. 159.

Motion overruled. See also *United States v. Simms*, 1 Cranch, 252.

United States v. Dixon.

CHARLES L. NEVITT'S ADMINISTRATORS v. WILLIAM R. MADDOX.

An insolvent debtor discharged under the insolvent act of the District of Columbia, cannot maintain a suit in his own name, for a cause of action which accrued before his discharge, nor can his administrator.

ASSUMPSIT, by the administrators of Charles L. Nevitt, who had been discharged under the "Act for the Relief of Insolvent Debtors within the District of Columbia," after the cause of action accrued and before the bringing of this suit.

At the trial, *Mr. Coxe*, for the defendant, objected to evidence of any cause of action which accrued before the discharge of the plaintiff's intestate; as all his choses in action existing at the time of his discharge had passed to Mr. Dawson, the trustee appointed under the act; and this among the rest.

Mr. Tabbs and *Mr. Key*, for the plaintiffs, contended that the action may be now entered for the use of Mr. Dawson, the trustee, and maintained in the name of the administrators.

But the COURT (THRUSTON, J., absent,) was of opinion that the action could not be brought and sustained in the name of the insolvent after his discharge upon a cause of action existing at the time of his discharge. *Non-pros.*

SAMUEL HILTON v. JOSEPH W. BECK.

In replevin, the defendant, (a constable who had seized the goods of the plaintiff in execution as the goods of Harrington,) was permitted to testify for himself, upon being indemnified by the plaintiff in the execution.

REPLEVIN, for goods of the plaintiff, taken by the defendant, a constable, as the goods of one Harrington, upon a *feri facias* against him.

Mr. Wallach, for the plaintiff.

Mr. Coxe, for the defendant.

The defendant, Beck, was permitted by the Court to testify for himself, upon being indemnified by the plaintiff in the *feri facias*.

See the case of *Wise v. Bowen*, in this Court, at April term, 1821, [2 Cranch, C. C. 239,] and *Dixon v. Waters*, at December term, 1824, Id. 527.

UNITED STATES v. JACOB DIXON.

It is an indictable offence at common law, to keep a common gaming-house, and for

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lucre and gain to cause idle and evil disposed persons to come and play together there, and to game for divers large and excessive sums of money, to the common nuisance of the citizens of the United States.

INDICTMENT for a common nuisance in keeping a common gambling-house for playing at the unlawful game called faro.

The indictment was founded upon the model of that in the case of *The King v. Rogier and Humphrey*, 1 B. & C. 272; S. C. 8 Sergeant and Lowber, p. 75, and charged, "that the said Jacob Dixon did, on," &c., "at," &c., "and on diverse days and times," &c., "with force and arms at," &c., "unlawfully keep and maintain a certain common gambling-house, and in the said gambling-house, for lucre and gain, on the said first day of January and on the other times aforesaid, then and there, did unlawfully and wilfully cause and procure divers idle and evil disposed persons to frequent and come to play together at a certain unlawful game called faro, and in the said common gaming-house on the said first day of January," &c., "unlawfully did permit and suffer the said idle and evil disposed persons to be and remain playing at the said unlawful game called faro, for divers large and excessive sums of money; to the great damage and common nuisance of the good citizens of the United States, to the evil example of all persons in like cases offending, and against the peace and government of the United States."

The jury having found the defendant guilty upon this indictment,

Mr. Coxe and *Mr. Dandridge*, for the defendant, moved in arrest of judgment, and for a new trial; and after full argument on the part of the defendant, *Mr. Swann*, for the United States, cited the precedent in Arch. Cr. Law, 363, and submitted the case to the Court.

CRANCH, C. J. delivered the opinion of the Court, (THRUSTON, J., absent,) as follows:—

Mr. Coxe and *Mr. Dandridge* have moved the Court in arrest of judgment, and contend that the matters charged in the indictment do not constitute an offence at common law. That at common law no game or gaming was unlawful; nor was it unlawful to keep a common gaming-house; and to this point they cited 3 Reeves's Hist. Stat. Law, pp. 170, 293; 1 Curwood's Hawkins, 721; Jac. Law Dict. "Gaming"; 9 Anne, c. 14; 4 Tuck. Bl. 171; *Commonwealth v. Richards*, Virg. Cases, 133; 3 Chitty, for the forms of indictment containing a count for a disorderly house. *The King v. Rogier and Humphreys*, 1 Barn. & Cres. 272; Hawk. B. 1, c. 32, § 2; *The King v. Dixon*, 10 Mod. 335; 33 H. 8, c. 9, § 12; 1 Doug. 60, 61, in *Chander v. Roberts*, referring to 10 Mod. 256.

The British statutes of 16 Car. 2, ch. 7, against deceit in gam-

ing; 9 Anne, c. 14, § 1, avoiding securities for money lost at gaming; Id. § 2, providing that if more than £10 be lost at play, at one sitting, it may be recovered; and § 3, requiring the winner to answer on oath, are in force in this country.

But the English and British statutes, prohibiting certain games to certain classes of persons, never were in force in Maryland, and, consequently, are not in force here.

The Act of 1797, c. 110, § 2, is the only act in force in this county, for restraining any kind of games, except the by-laws of the corporations of Washington and Georgetown; and that act only prohibits the setting up, keeping, and maintaining certain gaming-tables, or devices, in any tavern, or house occupied by a retailer of wine, spirituous liquors, &c. The game of faro is not an unlawful game. No person can be punished under that statute for playing at that game, whether it be played in a tavern or a private dwelling-house. The offence under the statute, is the setting up and maintaining the table or device.

The indictment, therefore, in the present case, derives no assistance from any statute; nor does the playing at faro constitute any part of the offence. If it can be supported at all, it must be as an indictment for a common nuisance in keeping a common gaming-house, for lucre and gain, at which divers idle and dissolute persons were permitted to assemble and game for divers large and excessive sums of money.

Hawkins, B. 1, c. 75, § 6, says: "Also it hath been said that all common stages for rope-dancers, and, also, all common gaming-houses, are nuisances in the eye of the law;" "not only because they are great temptations to idleness, but, also, because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighborhood." And in § 7, he says: "And it seems to be a proper distinction between playhouses and the nuisances mentioned in the foregoing section; that playhouses having been originally instituted with a laudable design of recommending virtue to the imitation of the people, and exposing vice and folly, are not nuisances in their own nature, but may only become such by accident; whereas the others cannot but be nuisances."

Hawkins cites *Higgins's case*, 2 Burr. 1232, for keeping and maintaining "a certain common, ill-governed, and disorderly house, and in the said house, for his own lucre and profit, certain evil and ill-disposed persons, of ill name and fame, and of dishonest conversation, to frequent and come together, then and there unlawfully did cause and procure; and the said persons, in the said house, then," &c., "and there to be and remain, fighting of cocks, boxing, playing at cudgels, and misbehaving themselves, unlawfully

and wilfully did permit, and yet doth permit ; to the great damage and common nuisance of all the subjects of our said Lord the King, inhabiting near the said house, and against the peace," &c.

Upon a motion in arrest of judgment this indictment was adjudged good, by the Court of King's Bench.

He cites, also *Rex v. Howell*, 3 Keb. 465, 510, which was an indictment at common law for keeping a cockpit six days, for which he was fined forty shillings a day, the court making the statute of 33 H. 8, c. 9, § 11, the rule of the fine, although the indictment was not under that statute.

He also cites *The King v. Dixon and Wife*, 10 Mod. 336. The court there said, that the keeping of a gaming-house was an offence indictable at common law. In that case, indeed, the indictment was upon the statute of 33 H. 8, c. 9, § 11 ; and the objection was, that the statute, having chalked out a particular method of proceeding for the recovery of the penalty of forty shillings a day, indictment would not lie. But the court said, that "where the statute gives a new penalty, or a new remedy for a common-law offence, the remedy at common law shall not be taken away without negative words."

It was also objected, that if it were to be considered as an indictment at common law, it would not be good, for want of concluding *ad commune nocumentum* ; but the court said it was "not necessary to conclude so here ; the offence, in its own nature, importing that it is so. Besides, the word 'common' supplies this defect, if it were one."

The statute of 9 Anne, c. 14, which makes playing at any game unlawful, if more than £10 shall be lost at one sitting, is in force in this country.

The indictment, in this case, is taken from the precedent in Archbold's Criminal Pleading, p. 363, which is the exact form used in the case of *The King v. Rogier and Humphreys*, 1 Barn. & Cress. 272 ; in which case Abbott, C. J., upon a motion in arrest of judgment, said, "I have no doubt that the facts stated in this indictment constitute an offence at common law. Hawkins, in the passage which has been cited, observes, 'It has been said that common gaming-houses are nuisances in the eye of the law ;' and then he assigns the reason, namely, that they tend to produce certain evil consequences ; which is not very different from saying that they are nuisances, if those consequences are produced. Since his time, many parties have been convicted upon indictments in which the keeping of such a house has been charged to be an offence at common law."

After stating that the recitals in the statute of 25 Geo. 2, c. 36, are "a legislative declaration that the keeping of a gaming-house

is an indictable offence," Mr. Chief Justice Abbott proceeds: "Besides, the 9 Anne, c. 14, § 2, makes playing at any game unlawful if more than £10 shall be lost. Now, in this case, the indictment states, not only that the defendants kept a common gaming-house, but that they permitted persons to play there for divers large and excessive sums of money. The playing for large and excessive sums of money would, of itself, make any game unlawful; and, if so, there can be no doubt that this is an offence at common law."

Bayley, Holroyd, and Best, Justices, concurred, and Holroyd, J., further added, "that in his opinion, it would have been sufficient merely to have alleged that the defendants kept a common gaming-house." The motion in arrest of judgment was overruled.

It may be observed, that in that case the judges laid no stress upon the fact charged in the indictment, that the defendant caused persons to come to play together at a certain unlawful game called *rouge et noir*; nor have I been able to find, that at the time when that case was decided the game of *rouge et noir* had been made unlawful by any statute. The statute of 33 H. 8, c. 9, repealed all the former "statutes made for the restraint of unlawful games, or for the maintenance of artillery, as touching the penalties and forfeitures of the same." By the eleventh section, it is enacted, That no person shall, for his gain, lucre, or living, keep "any common house, alley, or place, or place of bowling, coyting, cloysh, cales, half-bowl, tennis, dicing-table, or carding, or any other manner of game prohibited by any estatute heretofore made; or any unlawful new game now invented or made; or any other new unlawful game hereafter to be invented, found, had, or made; upon pain to forfeit and pay for every day keeping, having or maintaining, or suffering any such game to be had, kept, executed, played, or maintained, within any such house, garden, alley, or other place, contrary to the form and effect of this estatute, forty shillings.

The first statute, prohibiting any kind of game, was that of 12 R. 2, c. 6, (anno 1388,) and applied only to servants of husbandry, laborers, and servants of artificers and victuallers; not to servants of gentlemen; and it commands them to refrain from such games as "hand and foot ball, coits, dice, throwing of stone keyles, and such other importune games."

The statute of 11 H. 4, c. 4, (anno 1409,) enforces the 12 R. 2, c. 6, against laborers and servants playing at such unlawful games, by six days' imprisonment.

The statute of 17 Ed. 4, c. 3, (anno 1477,) "For unlawful games," says, "That as, according to the laws of this land, no person shall

use any unlawful games, that is to say, coits, foot-ball, or such like games ;" "contrary to which laws, the said games, and divers newly-devised games called cloish, kayles, half-bowle, hand-in-and-hand-out, and quekeborde, from day to day, are used in divers parts of this land ;" "which gamesters are daily supported and favored by the masters and occupiers of divers houses, tenements, gardens, and other places in which they use, and play at their said ungracious and not commendable games ;" wherefore, it was enacted, that no occupier or master of any house, tenement, &c., should voluntarily suffer any person to play at any of the said games, in any their said houses, tenements, &c., or any other place, under pain of imprisonment for three years, and to lose for every default £20. And that no person should use or play at any of the said games, under pain of two years' imprisonment, and £10 for every default.

The statute of 11 H. 7, c. 2, (anno 1494,) provided, that no artificer, laborer, or servant, should play at any unlawful game, but in Christmas.

But by the statute of 19 H. 7, c. 12, (anno 1503,) certain persons were forbidden to play at unlawful games.

The statute 3 H. 8, c. 3, (anno 1511,) provided that unlawful games should not be used.

By the statute 27 H. 8, c. 25, (anno 1535,) "There shall be no playing at unlawful games."

These are all the statutes upon the subject prior to 33 H. 8, c. 9. The titles only of the last four are given in Ruffhead's edition of the statutes, it being stated in the margin, that they were repealed by 33 H. 8, c. 9.

No principles are stated in any of them by which it can be ascertained what newly-invented games, (that is, games invented after these statutes,) should be deemed unlawful.

The 12th section of the statute of 33 H. 8, c. 9, makes it penal in any person to haunt the gaming-houses mentioned in the 11th section, and to play there. By the 13th section certain placards or licenses might be obtained, expressing what games should be used, and what persons should play thereat ; security being given by recognizance to the Lord Chancellor, not to use the placard contrary to the form thereof.

The 16th section provides, "that no manner of artificer, or craftsman of any handicraft or occupation, husbandman, apprentice, laborer, servant at husbandry, journeyman, or servant of artificer, mariners, fishermen, waterman, or serving-man," "shall play at the tables, tennis, dice, cards, bowls, clash, coyting, logatting, or any other unlawful game, out of Christmas, under pain of 20s. to be forfeit for every time ; and at Christmas to play at

any of the said games in their masters' houses, or in their masters' presence; and also that no manner of persons shall, at any time play at any bowls in open places out of his garden or orchard, upon pain," &c.

By the 21st section, leases of gaming-houses were to be void.

By the 22d and 23d sections, masters might license their servants to play with themselves or other gentlemen.

This statute did not prohibit gaming of any kind, at all times by all persons, and at all places; so that there was not, in truth, any game which was in itself unlawful. It only became unlawful by being used by certain persons, or in certain places, or at certain times.

The keeping of a common house for any unlawful game, for lucre and gain was prohibited; but no game was made unlawful unless played at such common house. The statutes thus formed a circle. Every game played in a common gaming-house, was unlawful; and every common house for playing at an unlawful game was unlawful.

Some other games are prohibited by name, in subsequent statutes, and all games with dice, except back-gammon; but the game of *rouge et noir* is not, as far as I have been able to search, mentioned in any of them. It was not, therefore, an unlawful game, unless made so by being played in an unlawful place, or by persons not authorized to play it, or at an improper time. If all games were unlawful when played in a common gaming-house, then it was unlawful because it was played in such a house. But, as I have before said, the court, in the case of *King v. Rogier and Humphreys*, did not lay any stress upon its being, in itself, an unlawful game. They seem to have decided the cause entirely upon the ground that a common gaming-house, kept for lucre and gain, at which persons are permitted to play for large and excessive sums of money, is, *per se*, a common nuisance.

The reason why it is to be considered as a common nuisance, is, that it tends to draw together idle and evil-disposed persons; to corrupt their morals, and to ruin their fortunes; which is the same reason which is given in the case of houses of common prostitution.

It is not because the game played in such a gaming-house is, in itself, an unlawful game, but because it is a common gaming-house kept for lucre and gain, where persons are permitted to play for money and other valuable property.

It has been said, in argument, that if the law be so, every man, who has a whist-party at his house, is liable to be prosecuted and punished for a nuisance.

Dixon v. Corporation of Washington.

But the distinction is broad and palpable. To become a common nuisance, it must be a common gaming-house, kept for lucre and gain; holding out allurements to all who are disposed to game, and kept for that purpose.

We entirely concur with the English judges, in saying that we have no doubt that the facts stated in this indictment, constitute an offence at common law.

The motion in arrest of judgment must therefore be overruled.

But there is also a motion for a new trial; and it is understood that the grounds are,

1. That there was no evidence that the playing was for large and excessive sums of money, which is a necessary constituent in the offence.

2. That there was no evidence that it was in fact a common nuisance; nor that idle and evil-disposed persons were there; nor that it was a common gaming-house, open to everybody.

3. That only one instance of playing was proved.

1. As to the first ground, the evidence was that the defendant kept a faro-bank, and the jury may be presumed to know the nature of the game and may have inferred from it, as they had a right to do, that whenever the game is played, it is for large sums; and that large sums are generally won and lost at that game.

2. It is not necessary to prove that it was a common nuisance. It was sufficient to prove that it was a common gaming-house, kept for lucre and gain.

3. It is not necessary to prove more than one act of gaming. It may be proved to be kept as and for a common gaming-house by other evidence than that of its having been often used as such.

Motion overruled.

JACOB DIXON v. CORPORATION OF WASHINGTON.

The keeping of a faro-table, contrary to the by-law of the Corporation of Washington of June 12th, 1730, is a single offence, although continued for many days. And although the penalty is \$50 a day, yet as the prosecution must be before a single magistrate whose jurisdiction cannot exceed \$50, no greater sum can be recovered upon any one warrant. A conviction or acquittal upon any such warrant is a bar to all acts of keeping prior to the issuing of such warrant. The day laid in the warrant is not material, so that the time actually proved, be subsequent to a former prosecution, (if there has been any such,) and before the issuing of the present warrant, and within the time of limitation. If the corporation would avail themselves of the daily penalty, they must issue their warrants daily.

APPEAL from six judgments of a justice of the peace, upon six warrants for \$50 each, for the penalty of the by-law of the 12th of June, 1830, for keeping a faro-table, on six consecutive days.

The warrants were all issued on the 6th of October, 1830. The first was for keeping the faro-table on the 7th of September, 1830. The second for keeping it on the 8th of September. The third for keeping it on the 9th, &c. The words of the by-law are — "No E. O.," "Faro," &c., "table or other device," &c., shall be set up, kept, or exhibited, in any part of this city, under a penalty of fifty dollars for every day or less time that each "E. O.," "Faro," &c., "shall be so kept or exhibited; to be recovered before any single magistrate, of the person so setting up, keeping, or exhibiting the same."

Mr. Ashton, for the appellee, contended that each day's keeping constituted a whole and separate offence; otherwise the corporation could recover only a single penalty of \$50, although the keeping should continue many days; for the penalty is to be recovered before a single magistrate whose jurisdiction in any one case is limited to that sum.

Mr. R. S. Coxe, contra. As the penalty is \$50 for every day or less time, it may as well be contended that every minute constitutes a separate offence.

If every day constitutes a separate offence, the day alleged in the warrant is material; for the offence of the 7th of September would not be the offence of the 8th of September.

CRANCH, C. J., delivered the opinion of the Court, (THRUSTON, J., absent.)

In this case, we are of opinion that the keeping of a faro-table, contrary to the by-law of the Corporation of Washington of June 12th, 1830, is a single offence, although continued from day to day for many days, and that the amount of the penalty is to be regulated by the number of the days, reckoning \$50 for each day. That all the keeping, previous to the issuing of the warrant, constitutes but one offence, and therefore that the day, charged in the warrant, is immaterial, so that the time, actually proved, be subsequent to a former prosecution, (if there has been any such,) and before the issuing of the present warrant, and within the time of limitation.

By the by-law, the penalty is to be recovered before a single magistrate, and cannot be recovered in any other manner; and as the jurisdiction of causes by a single magistrate is limited to \$50, a greater sum cannot be recovered in this suit; although a recovery in this suit will be a bar to all prosecution for acts, of keeping a faro-table, done previous to the issuing of this warrant. If new acts of keeping have been committed since the issuing of this warrant, they may be the subject of a new prosecution.

The judgment in this cause must be affirmed with costs.

In all the other cases, for acts done before the issuing of this warrant, the judgments must be reversed, with costs.

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If the corporation wish to avail themselves of the daily penalty, they must issue their warrants daily.

Mr. Coxe suggested a doubt whether the Court could give costs upon the reversal of the judgments; and the Court said they would consider of it. See *Ward's case*, [post,] May term, 1832, where costs were given upon reversal, at the discretion of the Court.

 PHILIP MAURO v. VESTRY OF ST. JOHN'S PARISH.

Quære, whether the owner of a pew in the Protestant Episcopal Church in St. John's Parish in the city of Washington, is personally liable for the taxes assessed upon such pew by the vestry of that parish; the owner not being a member of that church?

APPEAL from the judgment of a justice of the peace for \$38.50 for taxes upon a pew in St. John's Church owned by the appellant, who was not a member of the Episcopal Church, and who had taken an assignment of the pew in payment of a debt due to him by Mr. W. Lee.

Mr. Wallach, for the appellant, denied, 1st. That the vestry was competent to sue; and 2d. That there was no personal obligation upon the appellant to pay; the only remedy being a sale of the pew.

Mr. Coxe, for the appellees, cited the Act of Maryland, 1798, c. 24, §§ 2, 32, and 33; the Proceedings of the State Convention in 1816 and 1824; erecting St. John's Parish; Vestry-book 17, February 16, 1818, December 7, 1817; as to sale and rent of pews, November 1, 8, 1819; letter to pew-holders, November, 1819, April 26, 1826, March 22, 1819, November 1, 1819.

CRANCH, C. J., delivered the following opinion: (THRUSTON, J., absent, and MORSELL, J., doubting.)

This is an appeal from the judgment of a justice of the peace, against the appellant, for \$38.50 debt, and fifty-eight cents costs, rendered on the 17th of October, 1829, being the amount of taxes assessed on a pew in St. John's Church, which the appellant received by assignment from William Lee in payment of a debt; the appellant not being a member of that church.

It is contended by the appellant that he is not personally liable for such taxes; but that the only remedy for the non-payment thereof is a sale of the pew according to the terms contained in the certificate of ownership issued by the register of that parish, which is in these words:

"I certify that Philip Mauro is the owner of pew numbered 35, of St. John's Church in Washington city, valued at \$200,

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subject to such annual tax as is, or shall hereafter, be fixed by the vestry of said church, and to be sold at auction for arrearages of such taxes due six months or upwards after due notice has been given of the time and place of such sale; the said pew to be transferable only on the books of the register of this church, and the delivery of this certificate. In testimony whereof I have hereunto signed my name and affixed the seal of the said church, this day of in the year

“ ——— ———, Register.”

This certificate was issued, and received by the appellant on the 25th of November, 1824.

The parish of St. John, although the church had been built in 1816, and the congregation had worshipped there ever since, was not erected until the 18th of June, 1824, and no legitimate vestry was elected until Easter Monday in 1825; so that in November 1824, there was no vestry of St. John's parish, constituting a body corporate according to the Act of Assembly of Maryland of November, 1798, c. 24, competent to contract in that name, or in behalf of, or for the benefit of the future vestry.

The giving and receiving of the certificate of ownership, therefore, did not constitute a contract binding on the vestry, or upon the appellant; for it was no contract unless both were bound. Whatever, therefore, might have been the construction or effect of that certificate, it conferred no right of action upon the subsequent legitimate vestry. Mr. Mauro, however, although he denied his personal liability before the magistrate, admitted himself to be the owner of the pew.

This subsequent assent may, perhaps, give validity to the sale and to the contract, whatever it might be, which is contained in the certificate of sale.

But that certificate does not purport to be a personal obligation, or to create any implied personal liability on the part of Mr. Mauro, to pay the taxes which might be fixed by the vestry. It expressly states that the pew is “subject to such annual tax,” &c., “and to be sold at auction for arrearages of such taxes.”

By the 2d section of the Act of 1798, c. 24, the vestry cannot lay any personal tax exceeding \$2 a year; and that only upon “a free white male citizen of the State, above twenty-one years of age, resident of the parish,” and “who shall have been entered on the books of the said parish,” “as a member of the Protestant Episcopal Church,” and this tax must be made known and declared in writing within ten days after the election of the vestry. No express power is given to the vestry to tax pews which have been sold, and have become the private property of individuals. By the 31st section it is enacted that nothing therein

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before contained shall be construed to prevent the vestry from selling or renting the pews of their churches, provided that in so doing they shall not interfere with any existing right or title in any person to any pew or pews; but it gives no power to tax. The power to tax the pews is only given by the contract of sale; and cannot be extended beyond the terms of the contract. The person who purchases a pew, purchases it subject to the incumbrance of the tax liable to be collected by the sale of the pew; but he does not thereby assume any personal liability.

The vestry may rent the unsold pews, and the amount of the rent will be determined by the terms of the lease; which may create a personal obligation.

The certificate of sale, by providing one mode of collecting the tax, virtually excludes all others.

I am, therefore, of opinion that the vestry have no personal remedy against Mr. Mauro, for the tax on the pew, but may resort to a sale of it according to the terms of the contract.

At a subsequent term the matter was settled by the parties.

 UNITED STATES v. JENNEGEN.

The statute of bigamy, 1 Jac. 1, c. 11, was expressly enacted and declared to be in full force to all intents and purposes in Maryland, by the Act of 1706, c. 8; and by the bill of rights of that State, and the Act of Congress of 27 February, 1801, became the law of the county of Washington.

Quære, whether, in a prosecution for bigamy, evidence of a marriage *de facto* is evidence of a marriage *de jure*?

On a conviction for bigamy, the Court may dispense with the burning in the hand.

INDICTMENT FOR BIGAMY, under the Maryland Act of 1706, c. 8, which enacted and declared the British Statute of 1 Jac. 1, c. 11, against bigamy, to be in force in the then Province of Maryland.

Mr. Swann, United States Attorney, offered parol evidence, (the testimony of the mother of the first wife,) that the prisoner was married to her daughter (Elizabeth Hunt) in Philadelphia by a minister of the Methodist Church; and cited Archbold, 358; 1 Hale, 692; and *The King v. The Inhabitants of Brampton*, 10 East, 282; *Morris v. Miller*, 1 W. Bl. Rep. 632; S. C. 4 Burr. 3057.

Mr. Coxe, *contra*, contended that it must be proved to be a legal marriage according to the laws of Pennsylvania. That the United States must first show what the law of Pennsylvania is; and then a marriage according to that law.

He also contended that it was not competent to the legislature of Maryland to enact a foreign law; and that the statute of 1 Jac. 1, c. 11, was not in force in Maryland on the 27th of

February, 1801, and was not one of the laws which, by the Act of Congress of that date, continued in force in the county of Washington, [1 Stat. at Large, 103.]

Upon the first point he cited 1 Hawk. c. 32, § 10; 26 Geo. 2, c. 33, § 14; *Ilderton v. Ilderton*, 2 H. Bl. 145, 158; Archbold, 87.

Mr. Swann. It is only necessary to prove a marriage *de facto*, by showing a contract, a solemnization by a person appearing to be a clergyman, and cohabitation. 6 Bin. 408.

The COURT (THRUSTON, J., absent,) permitted the mother of the first wife to testify that the prisoner was married to her daughter, Eliza Hunt, on the 17th of March, 1827, by a minister of the gospel, in Philadelphia, at the house of the witness's husband, No. 165 South street, by Mr. Prettyman, a Methodist preacher; and that the prisoner and her said daughter from that time cohabited as man and wife.

The second marriage, namely, to Sarah Ledberg, was proved by another witness.

The Court, at the prayer of *Mr. Coxe*, the prisoner's counsel, instructed the jury, that it was incumbent upon the United States to prove to their satisfaction, that the marriage in Pennsylvania was a valid marriage according to the laws of Pennsylvania; but refused to instruct them that there was no evidence of the law of Pennsylvania; the Court being of opinion that proof of a marriage *de facto* was *prima facie* evidence of a marriage *de jure*.

The Court said they would consider the question whether the statute of James was in force by virtue of the Maryland Act of April, 1706, c. 8, upon a motion in arrest of judgment; and also the correctness of their opinion upon the evidence, in a motion for a new trial.

Upon the motion for a new trial because the evidence of the first marriage was insufficient,

Mr. Coxe, for the prisoner, cited *Dalrymple v. Dalrymple*, 2 Haggard's Rep. 54, 58, 60; *Schrimshire v. Schrimshire*, 2 Haggard's Rep. 412; *Middleton v. Janverin*, 2 Haggard's Rep. 437, 447.

Upon the motion in arrest of judgment, he contended that if the statute of James, "and every article, clause, matter, and thing in the said act contained," is to be "in full force to all intents and purposes," then it is in force in England and Wales only; to which places its operation is expressly limited by the act itself.

He also contended that the legislature of Maryland, in the year 1706, was not competent to enact a statute by reference to a foreign law.

Mr. Swann waived his right to reply, and submitted the case to the Court.

CRANCH, C. J., delivered the following opinion :

The ground of the motion in arrest of judgment was, that the statute of James was not in force in Maryland on the 27th of February, 1801, when the laws of Maryland were adopted by Congress as the laws of this county.

By the Act of Maryland, 1706, c. 8, it is enacted, "That the Act of Parliament made at," &c., "in the first year," &c., "of our Sovereign Lord, King James the First," entitled "An Act to restrain all persons from marriage until their former wives and former husbands be dead," "and every article, clause, matter, and thing in the said act contained, shall be and are in full force, to all intents and purposes, within this province."

It was objected by the counsel of the prisoner, that it was not competent for the legislature to enact a statute by reference to a foreign law. That if the Act of Maryland of 1706, c. 8, be taken strictly and literally, "and every article, clause, matter, and thing in the said act contained," is to be in force in Maryland, then the legislature of Maryland has enacted, "that if any person or persons within his Majesty's dominions of England and Wales, being married," &c. ; so that the statute still applies only to persons in England and Wales.

But such could not have been the intention of the legislature of Maryland. Their meaning evidently was that the act should be, and actually was in force in Maryland, in the same manner and to the same extent, as it was in force in England and Wales.

The words, "are in full force," imply a recognition of the already existing validity of the statute of James, in Maryland ; and such was the fact ; for there had been prosecutions in Maryland, under that statute, as early as 1682. (See Kilty's Report to the Legislature, p. 170.) So that, whether it was expressly reenacted by the Maryland Act of 1706, or was one of those English or British statutes which had been "introduced, used, and practised by the courts of law or equity," in Maryland, before the Revolution, it became the law of Maryland, under the 3d section of the Bill of Rights.

There can be no doubt, therefore, that the statute of 1 Jac. 1, c. 11, was in force in Maryland on the 27th of February, 1801, and by the Act of Congress of that date, [2 Stat. at Large, 103,] became part of the law of this county.

The motion for a new trial was because no evidence was given of the law of Pennsylvania, to show that the first marriage was conformable to the requisitions of that law.

The cases cited by the counsel of the prisoner, upon this point, seem decisive that the foreign law must be proved, and that the

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foreign marriage cannot be presumed, *primâ facie*, to be valid unless the foreign law be given in evidence.

I think, therefore, that a new trial ought to be granted.

MORSELL, J., concurred in this opinion, as to the motion in arrest of judgment, but not as to the motion for a new trial. (THRUSTON, J., absent.)

In this state of the case, the prisoner, having been in gaol nearly or quite a year, withdrew his motion for a new trial, and the Court, in consideration of his long imprisonment, sentenced him to seven days' further imprisonment, and dispensed with the burning in the hand.

DANIEL D. ARDEN v. JESSE BROWN.

Sales at public auction are not within the statute of frauds.

The statute of enrolment of conveyances, 1766, c. 14, relates to estates at law only, not to the transfer of equitable interests.

A contract to sell land, or an equitable interest in land, is not void for want of acknowledgment and enrolment.

A parol agreement among the purchasers at a public sale, is void under the statute of frauds.

BILL IN EQUITY, filed August 14, 1829, stating that the plaintiff, on the 12th of July, 1826, purchased, for a valuable consideration, half of H. Langley's interest in the property called the Indian Queen Hotel, in Washington, District of Columbia, which interest was one seventh. That Langley, by an instrument in writing, signed by him, assigned to the plaintiff one half of that interest, and to the defendant, Jesse Brown, the other half. That Langley was a joint purchaser with the defendant, Brown, and others, of the whole premises, in the name of Brown, who received a conveyance of the same from the commissioners, who sold the same under a decree of this Court, in the case of Crawford's Heirs. That the plaintiff had offered, repeatedly, to the commissioners, to comply with the terms of the sale, for the moiety of Langley's interest, but that they refused to permit him so to do. That Brown has refused to recognize him as assignee of Langley, &c.

CRANCH, C. J., after stating the substance of the bill, answer, and evidence, in delivering the opinion of the Court, said,

In bar of the plaintiff's claim, under the assignment of Mr. Langley, the defendant pleads the statute of frauds, and the statute of enrolment of conveyances.

Sales at auction are considered out of the statute of frauds, because it has been decided that the auctioneer, or his clerk, is the agent of the purchaser, and authorized by him to sign his

name in the sales-book which contains the terms of sale ; and that his entry in the book is a memorandum in writing, of the agreement, signed by a person thereunto lawfully authorized by the person to be charged therewith, agreeably to the 4th section of the statute of 29 Car. 2, c. 3.

Mr. Langley, therefore, on the 12th of July, 1826, had a valid interest in the property, which he could, in equity, assign. His assignment to Mr. Arden was by a written agreement, signed by both of them, and therefore not within the statute of frauds.

The statute of enrolment of conveyance, 1766, c. 14, relates to estates at law only, not to the transfer of equitable interests. The words are, " No estate of inheritance, or freehold, or any declaration or limitation of use, or any estate for above seven years, shall pass or take effect, except the deed or conveyance by which the same be intended to pass or take effect, shall be acknowledged," &c., and enrolled, &c.

It is believed that it has never been decided, that a contract to sell land, or an equitable interest in land, is void for want of acknowledgment and enrolment.

Neither the statute of frauds nor the statute of enrolment, is a bar to the plaintiff's claim, under the assignment of Mr. Langley. On the 13th of July, 1826, the plaintiff had as good a right to complete the sale, by a compliance with its terms, as Mr. Langley had. The time for complying with the terms of sale was not limited by the advertisement, nor by any verbal notice at the time of sale. The terms advertised, were: " One fourth of the purchase-money in six months, the remainder in equal instalments of one, two, three, four, and five years; the interest to be paid annually upon the whole amount; the several payments to be secured in such manner as the commissioners may hereafter determine and fix upon."

A reasonable time, therefore, must have been allowed for the purchasers to obtain and tender to the commissioners the security for the payment of the purchase-money.

The plaintiff, in his bill, has averred that he repeatedly offered to comply with the terms of sale, for the moiety of Langley's interest ; but he does not say when he made the offer, nor that it was made before the commissioners had returned Mr. Brown, as the purchaser. Nor does it appear by any averment or evidence in this cause, that the commissioners had any notice of the plaintiff's claim, as assignee of Langley, until after they had made their report to the Court. The defendant, indeed, does not deny that the offer was made, but he avers, that if any agreement was made, by which the plaintiff acquired any interest in the purchase, he never complied with the terms thereof, nor made the payments, nor gave the securities required by the conditions of sale.

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If the commissioners had no notice of the plaintiff's claim, as assignee of Mr. Langley, they could have received from him no offer to comply with the terms of sale, as to that portion of the property; and there is no pretence that Mr. Langley had ever offered to comply with those terms, as to any part of the property.

The commissioners were the sole judges of the security to be offered, and of the time within which it should be received, as a compliance with the terms of sale. It was certainly too late to offer it, after the commissioners had reported to the court, and returned Mr. Brown as the purchaser, and he had complied with the terms of sale.

The plaintiff, by the assignment from Mr. Langley, acquired only an inchoate right—a right to complete the sale, by giving the requisite security in a reasonable time. There is no complaint that a reasonable time was not given, and no evidence that the security was offered within that time. The plaintiff's right, therefore, was never complete, and he lost the benefit of his inchoate right by not complying with the terms of sale.

But the plaintiff claims to be considered as a joint purchaser of one seventh of the property, under a verbal agreement among the purchasers, on the evening of the day after the sale.

This, however, being a mere verbal agreement, is void under the statute of frauds.

Upon the whole, therefore, the Court is of opinion that the plaintiff has not made out any claim to the property which can be supported either in law or equity, and that his bill must be dismissed with costs.

The other judges concurred.

Mr. Wallach, for the plaintiff. *Mr. Marbury* and *Mr. Coxe*, for the defendant.

THE CHESAPEAKE AND OHIO CANAL COMPANY v. JOHN MASON.

An inquisition, condemning more land than can be reasonably required for the use of the Chesapeake and Ohio Canal Company, or if the boundaries are not ascertained with certainty, will be set aside by the Court.

THIS was a motion to set aside an inquisition condemning land of Mr. Mason, in Georgetown, District of Columbia, for the use of the Chesapeake and Ohio Canal.

The COURT, (THRUSTON, J., absent,) upon hearing the testimony of witnesses, and the argument of counsel, set aside the inquisition, because they were of opinion that the company had unreasonably required the condemnation of the whole lot, when they might have left valuable property to Mr. Mason, which seems to

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be of no use to the company, and because the jury had not ascertained, with sufficient certainty, the bounds of the land condemned.

Mr. C. Cox and *Mr. Swann*, for the plaintiff. *Mr. Key*, for the defendant.

JEREMIAH ORME v. THOMAS G. PRATT.

The Court will not grant a new trial because one of the jurors was brother-in-law of the plaintiff.

ASSUMPSIT. Verdict for plaintiff, \$99.75.

Motion by *Mr. R. S. Coxe*, for the defendant, for a new trial, because one of the jurors was brother-in-law of the plaintiff, a fact not known to the defendant, who was not personally present at the trial, nor to his counsel. The motion was supported by affidavits of the fact. The other eleven jurors made affidavit that the jury was unanimous in their verdict, immediately after their retirement, and that the other juror did not say or do any thing to influence the verdict.

Motion overruled.

Mr. C. Cox, for plaintiff.

RICHARD SMITH v. TENCH RINGGOLD.

If, by the terms and nature of a deed, the possession of the property is to accompany and follow the deed, and it does not, but remains with the grantor, such deed is fraudulent in law, and void as to the creditors of the grantor, although the deed should be acknowledged and recorded, according to the Maryland law of 1729, c. 8, § 5. But such deed is void, only against creditors of the grantor who thus retains the possession inconsistently with the terms and nature of the deed.

REPLEVIN for goods and chattels taken in execution by the defendant, the marshal of the District of Columbia, at the suit of *J. P. Van Ness v. J. Gales, Jr.*, on a judgment rendered May 28, 1828. The execution was delivered to the marshal, and by him levied upon the property, then in the possession of the said Gales, on the 26th of June, 1829.

The plaintiff claimed the goods under a deed of trust from *H. T. Weightman* and the said Gales, dated June 4, 1829, to the plaintiff. The said *H. T. Weightman* held under a deed of trust from the said Gales to him, dated July 28, 1828.

From the date of this deed until the levying of the execution, the goods remained in the possession of the said Gales. These

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deeds were both acknowledged and recorded according to the Maryland law of 1729, c. 8, § 5, which is in force in the county of Washington, D. C.

Mr. R. S. Coxe, for the defendant, contended, that these deeds were fraudulent in law, and void as to the creditors of Mr. Gales, because the possession did not accompany and follow the deeds.

Mr. Lear, for the plaintiff, *e contra*, contended,

1. That by the terms and nature of these deeds, the possession was not to accompany them, but was to follow them only in a certain event, so that, at the time of making them, they were not fraudulent in law; and could not afterwards become fraudulent by reason of the trustee's not taking possession of the goods, as he might have done.

2. That the possession by the grantor, even if it were inconsistent with the terms and nature of the deeds, did not make them void as to creditors, because they were duly acknowledged and recorded according to the act of 1729, c. 8, § 5. *Hudson v. Warner & Vance*, 2 H. & Gill, 415.

The COURT (THURSTON J. absent.) instructed the jury, at the prayer of the defendant's counsel, "that if they should be satisfied by the evidence, that at the time of the execution and delivery of the said deed of the 4th of June, 1829, from the said H. T. Weightman and the said Joseph Gales, Jr., to the said Richard Smith, the said Joseph Gales, Jr. was in actual possession of the property intended to be transferred and assigned by the said deed, and continued and remained in the actual possession thereof after the execution and delivery of the said deed, until the writ of *fieri facias* aforesaid was levied upon the same, or upon a part thereof, as aforesaid, then the said deed is, in law, fraudulent and void as to the said John P. Van Ness, the creditor in the same writ mentioned.

Verdict for the defendant, and bill of exceptions.

Mr. Lear, for the plaintiff, moved for a new trial, because the Court erred in the instruction given to the jury. The first deed from Gales to Weightman did not require that the possession should accompany it; and the deed from Weightman and Gales to Smith, the plaintiff, could not alter the trust. If this second deed is fraudulent and void, still the deed of trust from Gales to Weightman remains valid, and Weightman holds the property in trust for the security of the bank; so that the legal title was out of Gales at the time of the levying of the execution.

The first deed of 28th July, 1828, from Gales to Weightman, was in trust to secure the payment of a bill for \$2000, dated 23d July, 1828, at ninety days; and that if G. & S. "should fail to pay," &c., "when payment shall be required," then "the said H.

T. Weightman, his executors," &c., "shall take possession of the said goods," &c., "and sell the same," &c., "and pay," &c.

The deed of 4th June, 1829, was by H. T. Weightman of the first part, J. Gales, Jr., of the second part, and R. Smith, cashier, &c., of the third part; and after referring to the deed of the 28th of July, 1828, and stating the desire of Gales & Seaton to retire certain bills, &c., and to obtain a continuance of accommodation for a part thereof by a note for \$5000, dated 2d June, 1829, at sixty days, &c., it says: "Now this indenture witnesseth, that the said H. T. Weightman, in consideration of the premises, and of five dollars to him paid by the said Richard Smith," &c., "at the request, and with the consent and approbation of the said Joseph Gales, Jr., testified by his becoming party hereto," &c., "has bargained and sold," &c., "upon the trusts hereinafter mentioned."

"And this indenture further witnesseth, that the said Joseph Gales, Jr., in consideration of the premises and of five dollars to him paid by the said R. Smith, has granted, bargained, and sold to the said R. Smith," &c., "all his, the said J. Gales, Jr.'s goods, chattels," and personal estate, &c., "upon the trusts hereinafter mentioned," that is to say, "In trust to raise forthwith, by a sale of so much of the property hereby conveyed, or intended so to be, as may be necessary, the sum of two thousand dollars, over and above all expenses of said sale, and other expenses of this trust, and apply the same to the payment of the said note;" "and upon this further trust, in case of any default in the payment of the said note, or any other notes which may be, at any time or times hereafter given in lieu, or by way of renewal thereof, or of any part of the amount thereof, to sell the residue of the said property, or so much thereof as may be necessary," &c.

After argument upon the motion for a new trial,

The COURT (THRUSTON, J. absent,) was divided in opinion; the new trial, therefore, was not granted, and the plaintiff sued out his writ of error to the Supreme Court, where it was finally dismissed by consent of the parties.

CRANCH, C. J. delivered the following opinion:

The issue, I suppose, was, whether the property was in Joseph Gales, Jr. at the time of levying the *feri facias* of Van Ness against him, under which the defendant justifies the taking; or, perhaps, whether the legal title was then in R. Smith, the plaintiff.

The deed to H. T. Weightman was good against all the world; and transferred the legal title, so that it was no longer in Gales. That deed was not fraudulent at common law; because the possession remaining in Gales was consistent with the terms of the deed; and it was not void under the act of 1729, c. 8, § 5, because

it was acknowledged and recorded agreeably to the provisions of that act. And if it had not been so acknowledged and recorded, it would have been good between the parties. It could only have been defeated by a creditor of Gales.

When Weightman and Gales made the deed to the plaintiff, R. Smith, (4th June, 1829,) Gales had no legal title in the goods. He had only an equity of redemption. The legal title passed from Weightman to Smith, and the possession of Gales did not make the deed void as to Weightman; it could only be void so far as it attempted to transfer the rights of Gales, to the injury of his creditors.

As a deed from Weightman, it could only be avoided by Weightman's creditors.

But, even supposing that the instruction of the Court was correct, and that the deed from Weightman to Smith was fraudulent as to Van Ness, by reason of the possession of Gales, yet, the legal title, and the equitable title, too, so far as the interests of the Bank of the United States were covered by the deed from Gales to Weightman, were in Weightman, and the goods were not the property of Gales at the time of levying the *fiery facias*.

But I am inclined to think that the instruction of the Court was wrong, in directing the jury that the deed was void as between Weightman and Smith.

It did not purport to be a joint conveyance from Weightman and Gales; but each severally conveys his own interest. The whole legal estate was in Weightman. Gales could only convey his equity of redemption; and that would have been barred by a sale under the deed of trust from him to Weightman, without any further conveyance from Gales; so that the deed from Gales, (of the 4th of June, 1829,) was of no use but as evidence of his assent to the transfer of the trust from Weightman to Smith; and such assent was not necessary to bar the rights of his creditors to the property thus conveyed in trust to Weightman, and by him assigned to Smith. Therefore, as the possession of Gales could only avoid his act, and not that of Weightman, I think the Court erred in instructing the jury that the whole deed was void. If it had been a deed from Gales alone to Smith, and the possession had remained with Gales, and such possession was inconsistent with the deed, I think the instruction would have been right; because I do not think that the legislature of Maryland, in passing the Act of 1729, c. 8, § 5, intended to give validity to any deed which would have been fraudulent as to creditors, either by the common law, or by any previous statute.

For a period of more than one hundred years before the Act of 1729, the law was settled, (as appears in the case of *Stone v. Grubham*, 2 Bulstrode, 218,) that, "if it was an absolute conveyance,

and a continuance in possession afterwards, this will be adjudged in law to be fraudulent, for this hath the face of fraud." And Buller, J., in the case of *Edwards v. Harben*, 2 T. R. 596, says, "That case has been universally followed by all the cases since."

The preamble of the fifth section of the Act of 1729, does not intimate an intention of making good any deed which would have been before void; but the statute makes deeds void, unless acknowledged and recorded, which would have been good before, to wit, deeds where the possession, remaining with the vendor, is consistent with the deeds; for it makes absolutely void, as against creditors, all sales, mortgages, and gifts of goods and chattels, whereof the vendor, mortgagor, or donor, shall remain in possession, unless the same be by writing acknowledged and recorded.

But the case of *Hambleton v. Hayward*, 4 Har. & Johns. 443, decided by the Court of Appeals in Maryland, in 1819, is said to be conclusive as to the construction and effect of the Act of Maryland, 1729, c. 8, § 5. Although we have the highest respect for the decisions of that very learned and respectable court, especially in regard to the construction of the statutes of that State, yet we cannot consider ourselves bound by such decisions made subsequently to the separation of this county from that State. Congress adopted the laws of Maryland as they existed on the 27th of February, 1801. At that time no such construction had been given to that statute by the courts of Maryland. We were, therefore, left to judge for ourselves of its meaning.

In the case of *Hambleton v. Hayward*, the county court, consisting of Earle, C. J., and Worrell, J., was of opinion that the deed was void as to creditors, because the possession remained with the vendor. This opinion was reversed in the Court of Appeals by Chase, C. J., and Johnson and Dorsey, J., against the opinion of Martin, J., so that there were three judges on one side and three on the other. It seems, therefore, to be a point fairly open for decision upon general principles.

The opinion of the Court of Appeals in that case is briefly stated by the Chief Justice. He says that "at the time when the Act of 1729, passed, it was in the power of debtors to make secret conveyances of property and retain the possession; and although such possession presented grounds of suspicion against them, yet, of itself, it was not sufficient to authorize decisions against them as fraudulent."

This was true as between the parties themselves; but if Lord Coke was right in the case of *Stone v. Grubham*, (2 Bulstrode, 218,) and Mr. Justice Buller, in *Edwards v. Harben*, (2 T. R. 595, 596,) it was not true as between the vendee and the creditor of the vendor; and had not been for more than one hundred

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years before 1729; which the Chief Justice seems to admit when he says, "The Act of 1729, c. 8, was intended that speedy information should be given to every person, of any transfer of personal property when the person, transferring the right, retained the possession; such possession, unless the deed was acknowledged and recorded, of itself, as to creditors and subsequent purchasers, defeated the first conveyance." But he proceeds to say, "The execution of the bill of sale, its acknowledgment, and recording, vests in the party the same interest he would have obtained if the possession had accompanied the transfer of the right;" and he concludes, "The Court are therefore of opinion, that if the bill of sale, in the bill of exceptions mentioned, was *bonâ fide* executed, the possession of the property contained in it by the vendor, of itself, under the Act of 1729, c. 8, will not render it fraudulent and void."

The conclusion is undoubtedly correct. The retaining of the possession, when the deed is acknowledged and recorded, will not, of itself, render the deed void under the statute; but the question is, Does the statute make valid a deed which would be void by the common law? It has no affirmative words to that effect; and there is sufficient ground for the statute to operate upon without giving it that effect. The legislature might have doubted whether absolute bills of sale, unaccompanied by possession, were absolutely void as to creditors, and they knew that conditional bills of sale certainly were not; they therefore made them all void as to creditors, unless acknowledged and recorded; for a conditional bill of sale, where the possession was, by the common law, permitted to remain with the vendor, was as injurious to creditors as an absolute bill. To permit a debtor to make an absolute bill of sale, and yet retain the possession and use of all his property, merely by acknowledging and recording the deed, would be to give him the most certain means of effecting and protecting his fraud.

We think, therefore, that it was not the intention of the legislature to give validity to any bill of sale or deed which would otherwise be, in law, fraudulent and void.

But, being of opinion that the Court erred in instructing the jury that the deed from Weightman and Gales to R. Smith, was entirely void by reason of the possession of Gales, I think a new trial ought to be granted.

MORSELL, J., however, did not agree to grant the plaintiff a new trial; and THRUSTON, J., being absent, and the plaintiff having taken his bill of exceptions to the instruction given to the jury, the motion for a new trial was overruled.

A writ of error was taken out, but not prosecuted; and was dismissed at January term, 1832.

CIRCUIT COURT OF THE UNITED STATES.

APRIL TERM, 1831, AT ALEXANDRIA.

MARY A. T. BERNARD v. JAS. L. McKENNA, Special Bail of
William Herbert.

In a *scire facias* against bail in *detinue*, upon a recognizance by which the bail undertook that his principal, if cast in the suit, should restore to the plaintiff the slave detained, if to be had; "if not to be had, that he would pay and satisfy the price of her, and such damages as should be adjudged to the said plaintiff, or render his, the said defendant's body to prison in execution for the same, or that he the said" (bail) "will do it for him," it is a good plea in bar, that no *ca. sa.* had been issued against the principal.

SCIRE FACIAS against bail in *detinue*. The *scire facias* stated that the plaintiff in November, 1828, by the judgment of the Circuit Court of the District of Columbia, for the county of Alexandria, "recovered against William Herbert, a negro woman named Caroline, of the value of \$300, if she could be had; but if not, then the value aforesaid of her the said Caroline, together with her" (the plaintiff's) "damages amounting to \$75, as by a jury assessed, also \$66.75, which to the said Mary Ann T. Bernard, were adjudged as well the said negro Caroline or her value, as for her damages for the unlawful detention of the same, as also for her costs about her suit in that behalf expended, whereof the said W. Herbert is convicted, as appears to us of record; and although judgment is thereupon given, yet execution of the said judgment still remains to be made and executed;

"And whereas James L. McKenna, heretofore, to wit, on the 27th day of November, 1827, personally appeared in open court and became pledge and bail for the said defendant, that in case he should be cast in the said suit, the said defendant shall restore to the said plaintiff, the said negro girl slave named Caroline, if to be had; if not to be had, that he will pay and satisfy the price of her, and such damages as should be adjudged to the said plaintiff, or render his the said defendant's body to prison, in execution for the same, or that he the said James L. McKenna would do it for him.

"Nevertheless, the said W. Herbert, has not restored the said

negro girl named Caroline, nor paid to the said plaintiff the value aforesaid of the same nor the damages aforesaid assessed, nor the costs of suit aforesaid, nor surrendered his body to prison in execution for the same, as we have, by the suggestion of the said plaintiff, M. A. T. B., in our said court before us understood; wherefore the said M. A. T. B. hath besought us to grant her a proper remedy in this behalf, and we being willing that what is right and just in this behalf should be done, we do therefore command you, &c., to make known, &c., to the said James L. McKenna to be and appear, &c., to show cause, &c., why the said M. A. T. B. should not have her execution against him for her judgment aforesaid, according to the form and effect of the recognizance aforesaid," &c.

To this *scire facias*, the bail pleads,

1. *Nul tiel record.*

2. That the said M. A. T. B. ought not to have or maintain her aforesaid *scire facias* thereof against him, because he says that on and before the appearance day of the *scire facias* in this cause issued, the said W. Herbert, the defendant in the said action, was and had been a lunatic, and this he is ready to verify; wherefore he prays judgment if the said M. A. T. B. ought further to have or maintain her aforesaid action against him, &c.

3. Because he says that after the said recovery of the said judgment, as in the said *scire facias* mentioned, and before the issuing of the said *scire facias*, there was no writ of *capias ad satisfaciendum* duly sued out or prosecuted out of the said Circuit Court of the United States for the county of Alexandria, in the District of Columbia, against the said W. Herbert, upon the said judgment, and duly returned in the said court, as, according to law, before the commencement of this suit there ought to have been; and this the said James L. McKenna, is ready to verify, &c.

To the two last pleas there was a general demurrer and joinder.

This cause was argued by *Mr. Neale* and *Mr. Taylor*, for the plaintiff; and by *Mr. Hodgson*, for the defendant, who cited *Tidd*, 1044, 1147; *Barcock v. Thompson*, *Styles*, 324; 3 *Tuck. Bl. Appendix*, 46; *Robertson's Forms*, 71; 8 *Vin. Ab.* 40; *Keilway*, 64; *Virginia Law*, p. 294.

Mr. Neale and *Mr. Taylor* cited 3 *Petersdorff*, *Ab.* 134, 167; *Virg. law* of 1826, §§ 5, 7; *Virg. law*, 10th December, 1793, p. 305, § 48; *Henning's Justice*, 137; *Virg. law* p. 291, December 27, 1792; 2 *Bac. Ab.*, Execution, A. *Wilson's Ed.*; *Virg. law* 12th December, 1792, p. 78, § 26, and 19th December, 1792, § 40, p. 113.

CRANCH, C. J., delivered the opinion of the Court, (*THRUS-*

Bernard v. McKenna.

TON, J., absent, but understood as assenting,) after stating the pleadings.

No exception is taken to the writ of *scire facias*, and the only question is to the validity of the second and third pleas.

The plea of lunacy is clearly bad; for the lunacy of the principal, after the bail was fixed, cannot be reason why the plaintiff should not have execution against the bail.

The question upon the demurrer to the third plea, is one of more difficulty.

At common law, the bail in all civil causes of arrest, was only bound to produce the body of the principal to answer the judgment; and, according to the English practice in *detinue*, I presume there must have been a judgment against the principal for the alternative value, and a *ca. sa.* issued thereon and returned *non est inventus*, in order to charge the bail. It is not, however, necessary in a *scire facias* against the bail, in ordinary cases, to aver the issuing and return of the *ca. sa.* against the principal; it is sufficient to set forth the judgment, the recognizance of bail, and the breach of the condition of the recognizance, by averring that the principal had not paid the judgment nor rendered his body in execution. The want of a *ca. sa.* must be pleaded to the bail.

At common law, we apprehend, no *distringas* could issue against the bail in *detinue*, as it might against the principal; for the body of the principal is only delivered to the bail for safe keeping so that it may be had upon the execution. We can find in the books no execution against the bail in *detinue*, nor any dictum, that the obligation of the bail in *detinue* differed from the obligation of bail in debt; we conclude, therefore, that, as the law is in England, it would be a good plea to a *scire facias* against bail in *detinue*, to say that no *ca. sa.* was issued and returned against the principal before issuing the *scire facias* against the bail.

The bail, in debt, may discharge himself by paying the debt, or surrendering the body of the principal in execution. He has his option of one of two things; and if he does either he discharges his obligation. So in *detinue* the bail has the option of three things; to deliver the specific chattel sued for; to pay the alternative value; or to render the body of the principal in execution. If he does either he is discharged.

The surrender of the body of the principal in either case is sufficient. But, in debt, the plaintiff must first have a *ca. sa.* returned against the principal before he can charge the bail. A *feri facias* returned *nulla bona* is not sufficient. It must be a *ca. sa.* So, in *detinue*, we see no reason why a *distringas* against the principal returned *nulla bona* should be sufficient to authorize the

plaintiff to obtain execution against the bail. The judgment upon the *scire facias* would not confine the plaintiff to execution by way of *distringas* against the bail; but would be in general terms, that the plaintiff should have execution of the judgment against the bail; and the plaintiff might, thereupon, obtain either a *distringas*, (if *distringas* will lie against the bail in *detinue*,) or *feri facias*, or *ca. sa.* But it will hardly be contended that he should have a *ca. sa.* against the bail before he has had his *ca. sa.* against the principal. It is said, (but it does not appear in this record,) that the plaintiff obtained a *distringas* against the principal, which was returned *nulla bona* before the issuing of the *scire facias*, and that the *distringas*, as to the specific thing, has not been superseded; and that, as the Act of Virginia of December 12th, 1792, § 26, p. 78, provides, "that the bail-piece shall be so changed as to subject the bail to the restitution of the thing, whether animate or inanimate, sued for, or the alternative value, as the court may adjudge;" the plaintiff may now have his execution, by way of *distringas*, against the bail.

Suppose, then, the Court, in this state of the cause, should award a *distringas* against the bail, and should, afterwards, "for good cause shown, direct it to be superseded, so far as relates to the specific thing, and to be executed for the alternative price or value only" according to the Act of Virginia of 10th December, 1793, § 48, p. 305; would this be just when, if the same thing had been done in regard to the *distringas* against the principal, the alternative value might have been recovered against him?

But, in the present case the bail-piece was "not so changed as to subject the bail to the restitution of the thing or alternative value, as the court should adjudge." The recognizance of bail set forth in this *scire facias* leaves the option with the bail, in the same manner as in the recognizance of bail in debt. The only difference is, that, in the present case, the option is of three things, and in debt it is only of two. It is not left to the Court to adjudge to which the bail should be subject; the restitution of the thing; or the payment of the value; or the surrender of the principal, as the Act of Assembly provides. And if it were so left to the Court to adjudge, we should doubt whether the bail could be liable until the Court should have adjudged to which branch of the alternative the bail should be subject.

The bail is only a substitute for the gaoler, unless the Court should have adjudged him liable for the restitution of the thing sued for.

The Court, however, must decide this case upon the recognizance of bail as set forth in the *scire facias*; and that recognizance, in our opinion, gives the option to the bail, to discharge

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himself, by the surrender of the principal, exactly as in the case of bail in debt; we therefore think that the third plea is good, and that the judgment on the demurrer to that plea must be for the defendant.

SHINN v. McKNIGHT.

The harbor-master in Alexandria, D. C., has no right to charge fees upon vessels which come from Philadelphia through the Delaware Canal, from the Delaware Bay to the Chesapeake Bay, and thence to Alexandria. They are to be considered as bay-craft.

APPEAL from the judgment of a justice of the peace for harbor-master's fees in the port of Alexandria, D. C.

CRANCH, C. J. delivered the opinion of the Court. (THRUSTON, J., absent.)

It is understood by the Court that the vessels for which the harbor-master, McKnight, the appellee, has charged his fees, in this case, were vessels employed as packets which came from Philadelphia through the Delaware Canal, from the Delaware Bay to the Chesapeake Bay, and thence to Alexandria. These vessels, we think, come within the meaning of the term bay-craft, in the Act of Assembly of Virginia, respecting harbor-masters, January 18th, 1798, pp. 14, 381, and that the harbor-master is not entitled to fees in such cases. The act does not confine the term "bay-craft" to Virginia vessels, nor is there any evidence that it has been so confined during the long practice under the law. Bay-craft belonging to, or coming from Maryland, have been considered, in practice, as much exempt from fees as Virginia bay-craft; and the fact that the craft came from Philadelphia through Delaware and Maryland cannot make any difference in principle. If the act could be considered as giving an exclusive advantage to Virginia vessels, I doubt whether it would not be void, as derogating from the exclusive right given to Congress by the Constitution of the United States, to regulate commerce among the several States.

I am therefore of opinion that the judgment of the justice was erroneous, and must be reversed with costs.

MORSELL, J., concurred.

Judgment reversed, with costs.

JAMES ATKINSON v. ROBERT GLENN.

Notice on the 28th of December, to take a deposition in Alexandria, on the 29th, is not too short, all the parties residing in that town.

May v. Sheehy.

An affidavit may be sworn before the counsel of the party, and may be wholly in his handwriting.

THE plaintiff's counsel, *Mr. Neale*, offered to read the deposition of Thomas Lee taken by commission under the Act of Virginia of November 29th, 1792, § 12, p. 279.

Mr. Hodgson, for the defendant, objected that the notice was too short, it having been given on the 28th of December, to take the deposition on the 29th of December, at Alexandria; all the parties residing in that town.

He also objected, that the affidavit that the plaintiff's claim depended, in a material part, upon the testimony of a single witness who was about to depart, was sworn before the plaintiff's counsel as a justice of the peace; and that the deposition also was wholly in his handwriting.

But the COURT (*MORSELL*, J. absent,) overruled the objections, and permitted the deposition to be read.

Verdict for the plaintiff.

JOHN F. MAY *et al.* v. EDWARD SHEEHY.

In an action of covenant by the assignee of the lessor against the assignee of the lessee, the plaintiff may give parol evidence of an assignment by the lessee to the defendant.

An assignee of the lessee is not liable to the lessor upon the covenants in the lease, unless he is assignee of the whole estate of the original lessee.

THIS was an action of covenant, by the assignee of the lessor against the assignee of the lessee.

The defendant pleaded that he was not assignee of the lessee.

The plaintiff offered parol evidence of possession by the defendant, and his payment of rent to the plaintiff, as evidence of an assignment. 2 Phil. Ev. 88, 89; *Derisley et al. v. Custance*, 4 T. R. 75.

Mr. Hewitt, for the defendant, contends that the assignment can only be proved by deed, and the deed must be produced.

Mr. Taylor, contra. The assignment from the lessee to the defendant is a matter not within the knowledge of the plaintiff. He is no party to it. As to him, it is *res inter alios acta*. He has no power, at common law, to call upon the defendant to produce the deed of assignment, if there was one.

The COURT, (*nem con.*) permitted the parol evidence to be given; but instructed the jury that the plaintiff was not entitled to recover in this action unless they should be satisfied that the defendant was assignee of the whole estate of the original lessee.

Verdict for the defendant.

BANK OF ALEXANDRIA v. THOMAS SWANN.

Upon a special verdict, the Court cannot, from the facts found, infer other facts which the jury might have inferred, but have not found.

Notice of the non-payment of a note for \$1,457, is not notice of the non-payment of a note for \$1,400.

Notice of the nonpayment of a note, payable in the Bank of Alexandria, D. C., put into the post-office at Alexandria on the day after the last day of grace, addressed to the indorser in Washington, D. C., was too late, as the bank closed at 3 o'clock, P. M., and the mail for Washington did not close in Alexandria until 9 o'clock, P. M.

ASSUMPSIT, by the indorsee against the indorser of the note of H. Peake, for \$1,400, payable and negotiable in the Bank of Alexandria, dated 23d June, 1829, at sixty days after date.

Special verdict.

The jury find the note for \$1,400 in the declaration mentioned, and that the defendant indorsed it for the purpose of having it discounted in the plaintiffs' bank, to take up a note for \$1,457, indorsed by the defendant, and due on the day of the date of the note in question. They also find that there was no other note drawn by H. Peake and indorsed by the defendant, discounted at the said bank, or in that bank for collection or otherwise.

That the plaintiffs transacted their banking business in Alexandria, D. C., and the defendant resided in Washington, D. C., seven miles distant. That the mail for Washington closed in Alexandria at 9 o'clock, P. M., and arrived at Washington on the next day.

That the banking hours were from 9 o'clock, A. M. to 3 o'clock, P. M. That notes not paid before 3 o'clock of the day on which they are payable are usually delivered out to the notary at 3 o'clock, and returned with the protest to the bank on the next morning.

That on the 25th of August, 1829, being the third day of grace on the note, it was by the teller of the bank presented at the bank, to the cashier for payment, who examined the books of the bank, and found that the maker had no funds there, and stated that fact to the teller, and that no other person appeared for him, at the bank, to pay the note.

That on the closing of the bank on that day, it was taken out by a notary-public for protest, and was, on the morning of the 26th of August, 1829, (being the next day,) returned to the bank with the protest, which was drawn up on the said 26th of August. That on the same 26th of August, the notary, on behalf of the bank, put into the post-office at Alexandria, long before the closing of the mail of that day, a letter written by him, addressed to the defendant at Washington, intending, by the said letter, to give him notice of the non-payment of the said note; which letter

was post-marked at the post-office in Alexandria, "Alex'a. Ca. Aug. 26," and is in the words and figures following: "Alexandria, August 26, 1829. Sir,—A note drawn by Humphrey Peake, for fourteen hundred and fifty-seven dollars, dated Alexandria, 23d June, 1829, payable to you or your order, at the Bank of Alexandria, sixty days after its date, by you indorsed, and for the payment of which you are held liable, is protested for non-payment, at the request of the president, directors, and company of the said bank. Respectfully, your obedient servant, B. C. Ashton, Notary-Public. 'Thomas Swann, Esq., Washington City;'" which letter was received by the defendant in due course of mail, on the 27th of August, 1829.

The jury also find the protest *in hæc verba*; which recites truly the note in the declaration mentioned, which was for \$1,400, and not for 1,457 dollars, as stated in the notice, although the figures \$1,457 are written on the margin. They also find that no part of the note has been paid.

The cause was argued for the plaintiffs, by *Mr. Taylor*, who cited *Lenox v. Roberts*, 2 Wheat. 377; *Bussard v. Levering*, 6 Wheat. 102; *Lindenburgh v. Beall*, 6 Wheat. 104; Chitty, (Ed. 1822,) p. 402; *Langdale v. Trimmer*, 15 East, 291; *Scott v. Liford*, 9 East, 347; *Robson v. Bennett*, 2 Taunt. 387; *Bank of United States v. Carneal*, 2 Peters, 543.

And by *Mr. Swann*, *pro seipso*.

CRANCH, C. J., after stating the substance of the special verdict, delivered the opinion of the COURT, (THRUSTON, J., absent.)

These seem to be all the material facts found by the jury; upon which, two questions are made:

1. Had the defendant any notice of the non-payment of the note upon which the suit is brought?

2. If he had, was it due notice?

1. If the same variance had existed in the declaration, it would have been fatal to the plaintiffs' cause; the note could not have been given in evidence. The variance is substantial; a note for \$1,400 is not a note for \$1,457.

The verdict states circumstances from which a jury might infer that the defendant understood it to be the note for \$1,400 which he had indorsed, but they do not draw the inference; and the Court is not permitted to draw any inference of fact from the facts found by the jury. The Court cannot say, therefore, that the defendant had any notice of the non-payment of the note mentioned in the declaration.

2. But if he had any notice, we think it was too late.

In *Lenox v. Roberts*, 2 Wheat. 373, it was decided, "that a demand of payment should be made upon the last day of grace,

and notice of the default of the maker be put into the post-office early enough to be sent by the mail of the succeeding day.

This was not done; and although it is found that it was the usage of the banks in Alexandria "to deliver out to the notary, on each day at 3 o'clock, all bills discounted by or to be paid at such banks, which became due on such day, for demand and protest; and for the notary to return such notes, with the protests for non-payment, to the said bank, on the morning of the succeeding day, soon after the bank opened," yet it is not stated, as part of the usage, that the notary should not give notice to the parties until after the return of the notes to the bank.

The notice, in the present case, was given by the notary; and might as well have been given on the 25th as on the 26th. He knew that the note had been dishonored at 3 o'clock on the 25th, and the mail did not close until 9 o'clock in the same evening. According to the decision in *Lenox v. Roberts*, therefore, we think the notice was too late.

Upon both grounds, therefore, we are of opinion that the judgment on the special verdict should be for the defendant.

Reversed, 9 Peters, 33.

CIRCUIT COURT OF THE UNITED STATES.

MAY TERM, 1831, AT WASHINGTON.

BANK OF THE METROPOLIS v. THOMAS SWANN.

In an action upon an appeal-bond to the Supreme Court of the United States, in setting forth the breach of the condition, it must be averred that the plaintiff has sustained damages to a certain amount, by the defendant's not making his plea good. The defendant is not bound by the condition of the bond, absolutely to pay the amount of the original judgment, nor even the damages and costs that may be awarded by the appellate court for the delay; but only to answer such damages and costs as the appellee shall sustain by the appellant's failure to make his plea good.

DEBT upon a bond given upon appeal to the Supreme Court of the United States, executed by Robert Y. Brent, Joseph Pierson, and the defendant, Thomas Swann, to the plaintiff, in the penalty of \$2,500, dated 14th February, 1825, with the following condition:

"Whereas lately, at a Circuit Court of the United States, for the District of Columbia, in the county of Washington, in a suit depending in the said court, wherein the Bank of the Metropolis was plaintiff, against Joseph Pierson and Robert Y. Brent, executors of Robert Brent, a final decree was passed against the said Joseph Pierson and Robert Y. Brent, executors of Robert Brent, and the said Joseph Pierson and Robert Y. Brent, executors of Robert Brent, having entered an appeal from the said decree of the said Circuit Court to the Supreme Court of the United States, and obtained a citation," &c.;

"Now the condition," &c., "is, that if the said Joseph Pierson and Robert Y. Brent, executors of Robert Brent, shall prosecute their appeal to effect, and answer all damages and costs, if they fail to make their plea good, then the above obligation to be void, otherwise to remain in full force and virtue."

The declaration, after setting forth the bond, (with *profert*,) and the condition, says: "Nevertheless, the said plaintiffs, in fact, say, that after the making of the said writing obligatory, to wit, at the term of January, 1828, the said cause came on to be heard before the said Supreme Court of the United States, and the said decree of the said Circuit Court was thereupon affirmed, with

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costs, to wit, on the 11th of February, 1828, at the county aforesaid, of which the defendant then and there had notice, whereby the said Joseph Pierson and Robert Y. Brent, executors of Robert Brent, did not prosecute their appeal to effect.

“ And the said plaintiffs, for assigning a further breach of the said condition of the said writing obligatory, according to the form of the statute in such case made and provided, further say, that the said Joseph Pierson and Robert Y. Brent, executors of Robert Brent, did not, after making the said writing obligatory, namely, on the said 11th of February, 1828, or on any other day between that day and the day of the impetration of this writ, namely, at the county aforesaid, answer the damages and costs, if they should fail to make their plea good, but suffered and permitted the same, to a large amount, [namely, the sum of eleven hundred and one dollars and $\frac{75}{100}$, with interest from the 29th day of July, (18 ,) as also the sum of by the court adjudged to the said plaintiffs, for their costs and charges by them, about their suit, in that behalf laid out and expended; and also the further sum of thirty-two dollars and ninety-four cents, by the said Supreme Court likewise adjudged to the said plaintiffs for their costs and charges by them, about their suit, in that behalf expended,] to be, and remain due, and in arrear, and unpaid, whereby an action hath accrued to the said plaintiffs to have and demand of and from the said defendant, the said sum of two thousand five hundred dollars, above demanded; yet the said defendant, although often requested so to do, hath not yet paid the said sum of two thousand five hundred dollars, above demanded, or any part thereof, to the said plaintiffs, but the same to pay hath hitherto wholly refused, and still doth refuse, to the damage of the said plaintiffs, one thousand dollars, and therefore they bring suit,” &c.

To this declaration, the defendant, after oyer, demurred, and assigned the following causes of demurrer:

1st. Because the decree of the Circuit Court, referred to in the declaration, is not set forth.

2d. Because the judgment of the Supreme Court is not particularly set forth.

3d. Because the bond only binds the assets of Robert Brent, deceased, and it does not appear, in and by the declaration, that there are assets wherewith the said judgment could be paid.

4th. Because it does not appear, by the declaration, that the defendants are, at this time, liable, personally, to the payment of the moneys claimed by the said declaration.

5th. Because the whole proceedings are erroneous and illegal.

Mr. R. S. Coxe, for the plaintiffs, contended that the executors

had, by this bond, bound themselves, personally, to pay the penalty of the bond; that it must be presumed that the judgment below was a judgment against them, personally, and for which they were personally liable, because, under the testamentary system of Maryland, (in force here,) no other judgment could be final, and no appeal lies, but from a final judgment or decree; that the defendant is bound to pay, not only the amount of the judgment below, but the costs in the Supreme Court, and the damages in that court, adjudged for the delay; and he cited 2 Tidd, 1082; and *Laserre v. Johnson*, 2 Str. 745; S. C. Lord Raym. 1459; 16 & 17 Car. 2, c. 8, § 3; 3 Jac. c. 8, as to Bail in Error; Maryland Act, 1789, c. , § 22; 1796, § 1, 2; 1 Har. Ent. 549; 2 Id. 315; 1 Id. 22; *Smoot v. Lee*, in this Court, (2 Cranch, C. C. 459.) See, also, *Catlett v. Brodie*, 9 Wheat. 553; *Baits v. Peters and Stebbins*, 9 Id. 556; 1 Saund. 117, and *Tucker v. Lee*, in this Court, (3 Cranch, C. C.)

Mr. Swann cited 1 Har. Ent. 20, and 2 Id. 315.

CRANCH, C. J., after stating the case, as aforesaid, delivered the opinion of the Court, (THRUSTON, J., absent.)

This is a bond with a collateral condition.

The obligors are not bound as they were in the recognizance of bail in error, required in England, by the statutes of 3 Jac. c. 8, and 16 & 17 Car. 2, c. 8, and in the appeal-bond required by the Maryland statute of 1713, c. 4, "to satisfy and pay, (if the judgment be affirmed,) all and singular the debts, damages, and costs adjudged upon the former judgment, and all costs and damages to be also awarded for the same delaying of execution;" but the condition of this bond is simply to prosecute the appeal to effect, and answer all damages and costs, if the appellants shall fail to make their plea good. To prosecute their appeal to effect, and to make their plea good, are equivalent expressions. If the appellants fail to prosecute the appeal to effect, they fail to make their plea good, and *vice versâ*. The obligation, then, is simply to answer all damages and costs, if the appellants shall fail to make their plea good. They are not to pay any specified sum — they are not absolutely bound, as under the English and the Maryland law, to pay and satisfy the original judgment, or even the damages and costs that may be awarded by the appellate court for the delay, but to answer such damages and costs as the appellee shall sustain or incur by their failing to make their plea good.

Before the obligee can have a cause of action upon the bond against the obligors, by reason of the appellants' not answering all damages and costs for failing to make their plea good, damages and costs must have been sustained and incurred, and must

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be ascertained and averred in the assignment of the breach of the condition of the bond ; for, in contemplation of law, that which is not averred, does not exist.

In this declaration, no damages are averred to have been sustained by the obligees in consequence of the failure of the appellants to make their plea good, or to prosecute their appeal to effect.

In the case of *Tucker v. Lee*, in this Court, at May term, 1829, this objection, after argument and great deliberation, was adjudged to be fatal in that cause. In the present case, the judgment is not set forth, either directly, or by reference to any record, so that the Court can see what was the nature of that judgment, and whether it was a judgment at law or a decree in equity. It is, indeed, called a "decree," which, in general, implies that it was in a suit in equity or admiralty ; but whether it was a decree for the specific execution of an agreement, or for a perpetual injunction, or whether it was against the appellants in their representative character, or personally, merely describing them as executors, does not appear ; so that it is impossible for the Court to ascertain, judicially, that the obligees have sustained any damages.

Nor does the declaration aver that the original decree in the court below, has not been performed and satisfied by the appellants ; nor does it state what was the decree or judgment of the Supreme Court.

These appear to the Court to be fatal objections to the declaration, and therefore it is not necessary to notice another objection stated as a particular cause of demurrer ; namely, that the bond binds only the assets of the testator, Robert Brent.

The judgment upon the demurrer must be for the defendant.

The plaintiffs had leave to amend on payment of the costs of the amendment. This cause was afterwards settled by the parties.

CLARKE & BRISCOE v. JAMES DRUET.

An affidavit, annexed to an account, that it "is just and true as stated, and no part thereof has been paid, except what is credited," is sufficient to hold the defendant to bail.

MOTION to rule the defendant to special bail, on the affidavit of Briscoe, one of the firm of Clarke & Briscoe, at the bottom of an account. "That the above account is just and true as stated, and that no part thereof has been paid, except what is credited."

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The COURT (THRUSTON, J., absent,) was of opinion that the affidavit was sufficient, within the rule laid down by this Court, in the case of *Smith v. Watson*, at December term, 1805, (1 Cranch, C. C. 311.)

Mr. Morfit, for the plaintiffs.

Mr. Wallach and *Mr. Coxe*, for the defendant.

The following cases were referred to: *Smith v. Watson*, (1 Cranch, C. C. 311); *Jolly v. Rankin*, (1 Cranch, C. C. 372); *Bartleman v. Smarr*, at December, 1810, (2 Cranch, C. C. 16); *Traverse v. Hight*, (2 Cranch, C. C. 41); *Way v. Selby*, (2 Cranch, C. C. 44); *Dawson v. Boyd*, not reported; 1 Sellon, 105, 108.

 CLEMENT SMITH v. BANK OF COLUMBIA AND BANK OF THE UNITED STATES.

A *fi. facias* issued by order of the president of the Bank of Columbia, under the 14th section of its charter, bound the lands and goods of the debtor from the time of the delivery of the writ to the marshal, if it bound them at all.

The 14th section of the charter of the Bank of Columbia granted by Maryland, was repealed by the 8th section of the Act of Congress of the 2d of March, 1821, except as to debts contracted with the bank previous to the passing of that act.

Notes, given after the date of that act and discounted by the bank for the purpose of applying the proceeds of such discounting to the payment of debts due before the passing of that act, are not within the exception in the repealing act. By taking and discounting the new notes the bank relinquished the right to the summary remedy annexed to the old debt.

A writ of *fi. facias* returned executed, that is, levied upon property, is a discharge of the debt as to the debtor, unless, by an actual sale of the property seized, the value should appear to be insufficient to discharge the debt. Until that appears, the plaintiff cannot have a new execution.

A plaintiff has no right to countermand a *fi. facias* after it has been executed.

The clerk had no authority to issue a second, or *alias* writ of *fi. fa.* upon the same order upon which the first was issued. There should have been a new order founded upon a new affidavit, &c.

The clause of the 14th section of the charter, which provides that "such executions shall not be liable to be stayed or delayed by any *supersedeas*, writ of error, appeal, or injunction from the chancellor," was only applicable to such writs of *supersedeas*, error, and injunction as the debtor himself might attempt to interpose, or as might be interposed by some person who had voluntarily subjected himself to the summary remedy by becoming a party to a note expressly made negotiable at the Bank of Columbia.

That clause could only regulate courts established under the authority of Maryland.

BILL for an injunction to stay the sale of lot No. 46, in Georgetown, under four writs of *fi. fa.* issued by order of the president of the Bank of Columbia, returnable to the October Rules, 1822.

The bill states that on the 1st of February, 1822, Bunnell and Robinson sold and conveyed to Clement Smith part of lot No. 46, in Old Georgetown, for \$3,850. That Bunnell and Robinson being indebted to the Bank of Columbia on four notes at

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sixty days ; namely, one for \$250, dated March 22d, 1821 ; one for \$200, dated March 8th, 1821 ; one for \$200, dated February 22d, 1821 ; and one for \$200, dated February 1st, 1821 ; the president of the Bank of Columbia, on the 21st of January, 1822, ordered the clerk to issue four writs of *feri facias*, under the 14th section of the charter, which writs were, on the 29th of March, 1822, levied on lot 112 of Beatty and Hawkins's addition to Georgetown ; but the property was never sold, nor have the executions been quashed ; but after the levy, the writs upon the second and fourth of the said notes, were countermanded. That the four writs were returned to April term, 1822, and thereafter other writs of *feri facias* were sued out on all the said notes, returnable to October Rules, 1822, and were levied on the said part of lot No. 46, to the abandonment of the first levies, and have not yet been returned ; That the complainant never assented to the said abandonment of the first levies ; and avers that the Bank of Columbia had no right to abandon them and levy on lot 46, until the property first levied on had been exhausted, or the levy quashed.

That under the 8th section of the Act of Congress of March 2d, 1821, the first and second of the said writs were issued illegally and irregularly. That, since the said levies, the notes and executions have been assigned by the Bank of Columbia to the Bank of the United States. That the complainant has, by way of compromise, offered to pay the amount due upon the third and fourth notes, if the Bank of the United States would assign them to him ; which they refuse to do, except upon terms and conditions oppressive and unreasonable ; and have caused that part of lot 46 to be advertised for sale under all the said four last writs of *feri facias* by the marshal. That Bunnell and Robinson are wholly insolvent. That the complainant has sold the said lot with warranty, and is therefore liable to make good the title.

The bill prays for general relief ; that the plaintiff's title may be perpetually quieted, and that the defendants may answer, &c. ; "and meanwhile, and until the further order of the Court," "to command and enjoin" them and their agents "that they desist and forbear further proceeding to advertise and sell the said part of lot No. 46, under the said executions or any of them."

The joint answer of the defendants admits the dates of the notes ; the issuing and the levying of the executions ; and avers that they created a lien, from the time of their issue, upon lot 46 in the hands of Bunnell and Robinson, or of any purchaser from them with notice of the said writs ; and that, being of record, they were, of themselves, notice to the complainant of the lien.

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That by the charter of the Bank of Columbia, the said writs were as valid and effectual, in law, to all intents and purposes, as if the same had issued on judgments, regularly obtained in the ordinary course of proceeding, and should not be liable to be stayed by any *supersedeas*, writ of error, appeal, or injunction from the Chancellor; so that the injunction, by force of the Act of Assembly, ought to be dissolved.

They do not admit the circumstances and times of issuing, levying, and returning the said executions, but require proof thereof, by the record of the marshal's returns or otherwise.

The order of the president of the Bank of Columbia to the clerk to issue the writs of *fi. fa.* is dated January 21, 1822. They were issued on the same day, and delivered to the marshal on the 23d day of January, 1822, at 3 o'clock, P. M.

The *fi. fa.* No. 250, was returned to April term, 1822, "levied as per schedule." This execution issued on the note dated March 22d, 1821.

The execution No. 252, was returned levied, as "per schedule in No. 250, and countermanded by cashier." This execution was issued on the note of March 8th, 1821. The execution No. 257, was returned levied as "per schedule in No. 250." This execution issued upon the note of 22d of February, 1821. No. 259 was issued on the note dated February 1, 1821, was returned "levied as per schedule in No. 250, and countermanded by cashier."

The above writs of *fieri facias* were levied on lot No. 112, in Beatty and Hawkins's addition to Georgetown, on the 29th of March, 1822, and valued by the marshal at \$4,000, as appears by the schedule referred to in the marshal's return, which is in these words:

"Schedule of the lands and tenements of Eliab Bunnell and William B. Robertson levied and taken in execution by Tench Ringgold, marshal of the District of Columbia, in virtue of writs of *fieri facias* Nos. 250, 252, 257, and 259, judicials, to April term, 1822, issued from the clerk's office of the said district for the county of Washington, to the marshal directed at the suits of the Bank of Columbia *versus* said Bunnell and Robertson.

"Schedule. Lot No. 112, in Beatty and Hawkins's addition to Georgetown, with all the improvements thereon valued at \$4,000. Georgetown, March 29, 1822, Tench Ringgold, marshal, District Columbia."

On this schedule was indorsed the written consent of Bunnell and Robertson to the valuation; and dispensing with appraisers; dated the same day.

Mr. C. Cox, for the plaintiff. The levy of the writs of *fieri*

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facias, countermanded, is satisfaction. There was no judgment to bind the lands. This *feri facias* had no greater effect on lands than a *feri facias* has upon goods and chattels. It has only the effect of an execution; not of a judgment; it only binds lands from its delivery to the marshal.

When the first writ was countermanded the lien was abandoned; and the second writ of *fi. fa.* was the commencement of a new suit under the 14th section of the charter. Wood's Inst. 608; *Clerk v. Withers*, Salk. 303; S. C. 2 Lord Raym. 1072; *Mildmay v. Smith*, 2 Saund. 243, n. 3; *Wilbraham v. Snow*, 2 Saund. 47; *Holbrook v. Ross et al.* in this Court at Alexandria, November, 1824, (not reported.)

Mr. Lear, contra. The 14th section of the charter declares that the execution issued by order of the president of the bank shall be as valid and effectual as if issued upon a judgment.

The order of the president of the bank to the clerk to issue the executions was made on the 21st of January, 1822, and they were issued on that day. The deed from Bunnell and Robertson to the complainant, C. Smith, was executed on the 1st of February, in the same year.

In England the judgment does not bind the lands. The lien does not exist until the *elegit* is issued, when it relates back to the first day of the term in which the judgment was rendered; and such also was the case as to goods and chattels at common law, until the statute of frauds, 29 Car. 2, c. 3, §§ 13, 14, 15, and 16, which limits the lien to the time of putting the execution into the hands of the sheriff.

The execution, therefore, as to lands, binds from the time of its issuing, and the lien does not wait till the execution gets into the hands of the marshal.

In lot No. 112, the defendant, C. Smith, had only an equitable title. The legal title had been conveyed to Richard Smith on the 28th of February, 1821.

But an injunction will not lie to stay an execution issued by order of the president of the bank under the 14th section of the charter, which expressly prohibits it. The only remedy is by motion to quash the execution.

It is true that two of the notes bear date since the repeal of the 14th section; but they were given in renewal of notes dated before the repeal, (March 2d, 1821.)

Mr. C. Cox, in reply. By taking new notes since the repealing act of the 2d of March, 1821, the bank has relinquished its right to the short process given by the 14th section of its original charter.

The levy of the first executions was not void by reason of the

insufficiency of the property. The plaintiffs in the execution ought to have pursued it to a sale.

The charter only prohibits the debtor from obtaining an injunction ; not a third party.

Mr. Smith, the complainant, was no party to the execution, and could not move to quash it.

Mr. Jones, on the same side, to show that the prohibition of injunction does not extend to third persons, nor even to the parties, cited the following cases, in this Court. *Mason v. Wilson*, (not reported) ; *Bank of Columbia v. Okeley*, (not reported) ; *Young v. Bank of Alexandria*, 4 Cranch, 396 ; *Bank of Columbia v. Dawes*, at May term, 1829, (not reported.)

CRANCH, C. J., after stating the case, delivered the opinion of the Court :

This cause is set for hearing, by consent, on bill, answers, general replication, and exhibits.

It is not important, in the present case, to decide whether the lands of Bunnell and Robertson were bound by the order of the president of the Bank of Columbia, to the clerk, to issue the executions under the 14th section of the charter of that bank, or by the issuing of the executions ; because they were, on the 23d of January, 1822, delivered to the marshal to be executed, and the deed under which Mr. Smith claims the lot No. 46, bears date nine days afterwards, namely, on the 1st of February, 1822 ; and there is no question that they bound the land and goods from the time of such delivery, if they bound them at all.

But the 14th section of the original charter of the Bank of Columbia, which was the only act under which the clerk of the Court had authority to issue executions upon the order of the president of the bank without a previous judgment of the Court, was repealed by the 8th section of the Act of Congress of the 2d of March, 1821, [3 Stat. at Large, 618,] which has this proviso : " That the said 14th section shall remain in full force and effect in relation to all debts contracted with the said bank previous to the passing of this Act."

Two of the notes, upon which two of these executions were issued, bear date after the passing of that act, namely, on the 8th and 22d of March, 1821. These two executions, therefore, were absolutely void, because the clerk had no authority whatever to issue them ; and the two subsequent executions, issued upon the same notes, were equally void, for the same reason.

It has indeed been contended that these notes were given for a debt previously due to the bank, and therefore to be still considered as evidence of the old debt. But when these notes were discounted by the bank, the proceeds were applied by the bank

to the extinguishment of the old debt; and it is presumed that the bank will not admit that the makers of those notes had a right to plead the statute of limitations to these new notes. By taking the new notes, the bank has relinquished the right to the summary remedy annexed to the old debt. But there is no evidence, in this cause, that these notes were given for a debt due before the 2d of March, 1821. The question therefore cannot be made in this case.

The notes, upon which the other two executions were issued, bear date before the 2d of March, 1821, namely, on the 1st and 22d of February, 1821, and were therefore subject to the summary remedy.

But the writs of *fiery facias*, issued upon these notes, were returned executed; that is, levied upon property valued by the marshal at \$4,000. This was a complete discharge of the debt, as to Bunnell and Robertson, unless, by an actual sale of the property seized, the value should appear to be insufficient to discharge the debt. The plaintiff cannot have a new execution; and the marshal is liable to the plaintiff, to the amount of the debt, or to the value of the property as returned by him, if it be less than the debt, unless he has been prevented by the plaintiff from proceeding to complete the execution; or the execution be quashed by the Court.

The law to that effect is clearly laid down, in the case of *Clerk v. Withers*, 2 Lord Raym. 1072, in error to the Court of Common Pleas, and affirmed by the unanimous opinion of the Court, after argument *seriatim* by all the judges. See also the following authorities, some of which were cited by the judges in their arguments in that case.

Rook v. Wilmot, Cro. Eliz. 208, 209; *Atkinson v. Atkinson*, Cro. Eliz. 390; *Langdon v. Wallis*, Lut. 588; *Mountney v. Andrews*, Cro. Eliz. 237; *Dike v. Mercer*, 2 Shower, 394; *Ayre v. Aden*, Cro. Jac. 73; *Thoroughgood's case*, Noy, 73; *Cleve v. Veer*, Cro. Car. 459; *Wilbraham v. Snow*, 2 Saund. 47, note 2, p. 47, *m*; S. C. 1 Lev. 282; *Harrison v. Bowden*, Sid. 29; *Mildmay v. Smith*, 2 Saund. 343; *Slie v. Finch*, 2 Roll. Rep. 57; S. C. Cro. Jac. 514; *Coriton v. Thomas*, Cro. Jac. 566.

It is averred in the answer, that the lot 112 had, before the issuing of the first executions, been conveyed by Bunnell and Robertson to Richard Smith, in trust, to secure a debt of \$2,000 to the Bank of the United States, and had, by him, been sold under that trust, before the defendants' resorting to the other property of Bunnell and Robertson, namely, part of lot No. 46, had been enjoined, &c. But the answer, in this respect, not being responsive to the bill, is not evidence of that fact; and, if it were,

still the return of the marshal, being matter of record, would be conclusive. There must have been a sale, to ascertain the value of the lot 112, or the marshal must have amended his return; or the executions must have been quashed before new executions could be lawfully issued, if they could be issued at all, without a new affidavit and order by the president of the bank.

Upon one of those executions, namely, that which was issued upon the note of the 1st of February, 1821, the marshal returned "levied as per schedule in No. 250, and countermanded by cashier," meaning the plaintiff's cashier.

But the plaintiffs, in that case, had no authority to countermand the writ after it was executed, nor had the clerk any authority to issue a new writ upon such a return.

Besides, in the case of *The Bank of Columbia v. Daves*, this Court, in May, 1829, decided that the clerk could not issue a second, or *alias*, writ of *fi. fa.* upon the same order upon which the first was issued, but must have a new order founded upon a new affidavit, &c.

This objection, alone, is fatal to the new set of executions.

It has, however, been suggested by the answer, and insisted upon in argument, that by the 14th section of the original charter of the Bank of Columbia, "such executions shall not be liable to be stayed or delayed by any *supersedeas*, writ of error, appeal, or injunction from the chancellor."

It is evident that this clause was only applicable to such *supersedeas*, writ of error, appeal, or injunction as the debtor himself might attempt to interpose, or as might be interposed by some person who had voluntarily subjected himself to the summary remedy, by becoming a party to a note expressly made negotiable at the Bank of Columbia. It never could be intended to apply to a stranger to the note, whose property might be seized under the execution.

But if this is not an answer to the objection, yet the case of *Young v. The Bank of Alexandria*, in the Supreme Court of the United States, 4 Cranch, 397, seems decisive as to this point. The question there arose upon these words, in the charter of that bank. "And from the judgment given in such cases, there shall be no appeal, writ of error, or *supersedeas*;" and the cause came on upon a motion to quash the writ of error, because issued in violation of that prohibition. Mr. Chief Justice Marshall, in delivering the opinion of the court, said:

"The act incorporating the bank, professes to regulate, and could regulate, only those courts which were established under the authority of Virginia. It could not affect the judicial proceedings of a court of the United States, or of any other State.

"There is a difference between those rights on which the validity of the transactions of the corporation depends, which must adhere to those transactions everywhere, and those peculiar remedies which may be bestowed on it. The first are of general obligation; the last, from their nature, can only be exercised in those courts which the power, making the grant, can regulate.

"The act of incorporation, then, conferred on the Bank of Alexandria a corporate character, but could give that corporate body no peculiar privileges in the courts of the United States not belonging to it, as a corporation. Those privileges do not exist unless conferred by an act of Congress."

For these reasons, we are of opinion that the writs of *fieri facias*, executed upon Mr. Smith's part of lot 46, in Old Georgetown, are void, and that the defendants ought to be perpetually enjoined from selling the same under the said writs, or either or any of them.

THRUSTON, J., and MORSELL, J., concurred.

THOMAS KING v. RICHARD GORSLINE and his Garnishee.

Drafts drawn by the defendant, upon his debtor, before attachment, are entitled to priority of payment, out of the fund in the hands of the garnishee, although the garnishee has no notice of such drafts until after attachment served.

GORSLINE owed King, and the Chesapeake and Ohio Canal Company owed Gorsline. King issued his attachment, which was served on the canal company on the 20th of August, 1830.

The garnishee pleaded *nulla bona*, and it appeared, in evidence, that before the issuing of the attachment, Gorsline had drawn upon the canal company, in favor of the Farmers and Mechanics Bank, for sundry sums of money advanced to him by them on the faith of those drafts, but the canal company had no notice of them until the day after the service of the attachment.

If they were entitled to priority, they exhausted the whole fund.

Mr. C. Cox, for the Farmers and Mechanics Bank, cited 1 Chitty on Bills, 1; *Yeates v. Groves*, 1 Ves. Jun. 280; *Brooks v. Rogers*, 1 H. Bl. 640; *Wakefield v. Martin*, 3 Mass. 558; Bac. Ab. 260, Custom of London; *Stevenson v. Pemberton*, 1 Dallas, 3; *Wood v. Roach*, 2 Id. 180; *Welch, use of Prior v. Mandeville & Jamesson*, in this Court, (2 Cranch, C. C. 82); Sergeant on Attach. 80, 81.

Mr. Wallach, for the plaintiff, contended that a bill drawn is not an assignment of the fund, against attaching creditors, until notice to the drawee. *Mandeville v. Welch*, 5 Wheat. 277; *Stewart v. West*, garnishee of Jenners, 1 Har. & Johns. 537.

The COURT (*nem. con.*) was of opinion that the drafts of the defendant, upon the garnishees, were an equitable assignment of so much of the funds of the debtor, in their hands, and those drafts having exhausted the whole fund, the Court quashed the attachments.

The question submitted to the Court was, whether the F. and M. Bank had a priority, by reason of the drafts of Gorsline, received by the bank, but not notified to the canal company, the drawees, until after the attachments served.

UNITED STATES, Appellant, v. JOSEPH NOURSE, Appellee.

A register of the Treasury of the United States is entitled to a reasonable compensation as agent for disbursing the money appropriated for the contingent expenses of the Treasury Department, library of Congress, and other appropriations for public purposes, although, at the same time, he discharges the duties, and receives the pay, of register of the Treasury; and such compensation is not barred by the statute of limitations.

THIS suit was commenced on the 14th of July, 1829, by a treasury warrant issued under the hand and seal of S. Pleasonton, "Agent of the Treasury," under the second section of the Act of Congress of the 15th of May, 1820, [3 Stat. at Large, 592,] entitled "An Act providing for the better organization of the Treasury Department;" directed to the marshal of the District of Columbia, and commanding him to proceed immediately to levy and collect the sum of \$11,769.13, by distress and sale of the goods and chattels of the said Joseph Nourse, giving ten days' notice of such sale; and should there not be found sufficient goods and chattels to satisfy the said sum, he was thereby commanded to commit the body of the said Joseph Nourse to prison, there to remain until discharged by due course of law; and should the said Joseph Nourse be committed to prison as aforesaid, or should abscond, and sufficient goods and chattels should not be found to satisfy the said sum, the marshal was thereby commanded to levy upon and expose to sale, at public auction, for ready money, to the highest bidder, the lands, tenements, and hereditaments of the said Joseph Nourse, or so much thereof as might be necessary, &c., upon three weeks' notice, and to make return of the said warrant "to this office," that is, the office of the Agent of the Treasury.

By the 4th section of the Act, any person considering himself aggrieved by such a warrant, may prefer a bill of complaint to any district judge of the United States, who may grant an injunction, upon bond and security, and the same proceeding shall be

had on such injunction as in other cases, except that no answer shall be necessary on the part of the United States. The fifth section provides, that such injunction may be granted in, or out of, court; and the sixth section enacts, that any person aggrieved by the refusal, or the dissolution, of any injunction, may apply to a judge of the Supreme Court, who may grant the injunction or permit an appeal, upon which the same proceedings may be had in the Circuit Court, as in the District Court.

This warrant having been levied by the marshal, on the lands, tenements, goods, and chattels, of Mr. Nourse, he preferred his bill under the fourth section of the act, on the 25th of August, 1829, to the Chief Judge of the Circuit Court of the District of Columbia, who, by virtue of that office, is sole Judge of the District Court of the United States for the District of Columbia; in which bill, after stating that since his recent removal from the office of register of the treasury, (May 31, 1829,) his public accounts as register and agent of the Treasury Department in disbursing certain funds, and settling certain accounts of contingencies, and other miscellaneous matters, and as agent for the Joint Library Committees of Congress, matters altogether distinct from, and unconnected with, his duties as such register, have been settled at the treasury, and a pretended balance found against him of \$11,250.26, for which a warrant had been issued against his lands, tenements, goods, and chattels, under the Act of May, 1820, and levied upon the same in his absence. He avers that the said account is unjust and illegal; and that so far from any balance being due to the United States, a considerable balance should have been struck thereon in his favor, as appears by an account filed by him, and which he declares to be just and true. That he took upon himself this distinct branch of duty at the special instance and request of the proper department of the government, having competent authority to engage him or any other agent in that capacity. That the performance of those duties devolved upon him great labor, responsibility, and risk, independent of, and apart from, his proper duties as register, and occupied a great portion of his private hours; that is, of those hours when, according to the established order and routine of his department, he was altogether discharged, and free from the proper duties appertaining to his office of register, and had his time at his own disposal, but for his employment as special agent as aforesaid. And that besides the great labor and consumption of time induced by this extra employment, he was exposed to considerable pecuniary losses from the ordinary errors that occasionally occur in the accounts of the best accountants, from the multiplicity and minuteness of the various accounts and vouchers to be settled and preserved.

That when he undertook this branch of public employment, the precise nature and amount of compensation therefor were not ascertained by any particular stipulation. That the usage of the Treasury Department, and other departments of the government, has invariably been, since the organization of the general government, to allow such commissions, or percentage, not only to unofficial persons so employed, but to official persons and clerks of the departments, when such duties were distinct from the stated duties of their offices, although such official persons were in the receipt of fixed salaries for their stated duties.

That as early as the year 1800 he made out an abstract of these services, claiming to be allowed a compensation therefor; which original abstract is on file in the Treasury Department. That he has duly made out and presented his account to the proper accounting officer of the treasury, charging his commission at the rate of two and a half per cent. on the amount of his disbursements, which, if allowed, would, after a full and fair settlement of all his public accounts, leave the United States indebted to him in a balance of \$9,886.24; which he has good reason to believe, and does believe, to be justly and equitably due to him from the United States, as stated in his annexed account.

That the accounting officers of the treasury have rejected his said charge, and denied him any manner of compensation for his extra services as such special agent as aforesaid; not on the ground or pretence that his charge of commission is too high or unreasonable, if he were entitled to any compensation; but that he is not entitled to any compensation whatever for such extra services. He denies that he is within the description of persons, or officers, over whom the act gives jurisdiction to the Agent of the Treasury; which opinion he supports by an extended argument in his bill; wherefore he prays that the parties may be remitted to the ordinary process of law, so as to have a fair trial on the merits before execution be had of his body or estate, and an injunction to stay proceedings on the warrant altogether.

The injunction was granted, and served upon the Agent of the Treasury, with a citation to appear and answer the bill at the next District Court at Alexandria; when and where *Mr. Swann*, the Attorney of the United States for the District of Columbia, appeared and answered, that upon a settlement, by the proper accounting officers of the treasury, of the complainant's general account, comprehending the different agencies under which he acted as register of the treasury, he was found indebted to the United States in the sum of \$11,769.18, as appears by the account, a copy of which the complainant has exhibited with his bill, with the letter of Joseph Anderson, Comptroller, which shows the

grounds upon which the United States claim the balance of \$11,769.18; and that the difference between that and the complainant's account consists of the commissions at two and a half per cent. claimed by him on his disbursements.

The answer denies that the complainant is entitled by law to those, or any commissions, and prays that the injunction may be dissolved.

On the 20th of December, 1830, the District Judge, having heard the parties by their counsel, made the following order and decree:

"That the said Joseph Nourse has produced satisfactory evidence that he did, for a long course of years, render various services and disburse large sums of money for the use of the United States, and at their request, from time to time, made through the respective Secretaries of the Treasury, for the time being; which services and disbursements were performed and made by the said Joseph Nourse over and above the services required by the duties of his office as register of the treasury of the United States, for which said extra services and disbursements he has never been allowed any compensation in the settlement of his accounts in the Treasury Department; and it being deemed by the court expedient to ascertain by the report of auditors to be appointed by the court for that purpose, the value of those services, and the compensation to which the said Joseph Nourse is equitably entitled therefor, and for his disbursements as aforesaid: It is further ordered that Robert J. Taylor, Phineas Janney, and Colin Auld, be, and they are hereby appointed auditors to ascertain the said value and compensation, and to report thereon to this court without delay; and that such of the papers and evidence in this cause as relate to that subject, be submitted to the said auditors for their better information thereon."

On the 31st of December, 1830, the auditors reported, "That it appears from the documents and evidence submitted to them, that from the 10th of April, 1790, to the 31st of May, 1829, thirty-nine years, one month, and twenty-one days, the complainant, as agent for the payment of contingent expenses of the Treasury Department; for stationery and printing of public accounts; for payment of the superintendent and watchmen of the State and Treasury Departments; for miscellaneous disbursements, comprising fifteen different agencies; for advances made to sundry persons who brought from the several States the votes for presidents and vice-presidents of the United States; and on account of the congressional library; disbursed the sum of \$943,308.83; the services rendered in which said agencies, and in making said disbursements, were over and above the services required of him by

the duties of his office of register of the treasury of the United States.

We find that for similar services, where no special provision had been made by law, a commission of two and a half per cent. has been, heretofore, in many cases, allowed at the Treasury of the United States; and we are of opinion that a commission of two and a half per cent. on the said sum of \$943,308.83, amounting to the sum of \$23,582.72, is an equitable compensation for the services so as aforesaid rendered to the United States by the said Joseph Nourse; and that the said services are equitably worth the said last-mentioned sum."

Whereupon the following decree was made by the District Judge, on the 4th of January, 1831.

"And at a court continued and held for the said district on the 4th day of January, 1831, the auditors, Robert J. Taylor, Phineas Janney, and Colin Auld, to whom," &c., "having made and returned their report," &c., "and no sufficient reasons having been presented to the Court against the confirmation of the said report of the said auditors; It is, therefore, this 4th day of January, 1831, ordered, adjudged, and decreed, that the said report be, and the same is hereby, in all particulars confirmed and made absolute; and the said cause now also coming on for final decision upon said report, and the bill, answer, replication, exhibits, depositions, and other evidence admitted by the parties, and upon the equity reserved under and by the said interlocutory order; It is further ordered, decreed, and adjudged, that the injunction, heretofore granted in this cause, be, and the same is hereby perpetuated; and that the said defendants be, and they are hereby perpetually enjoined from proceeding further against the said complainant upon the warrant of distress in the bill mentioned for or on account of the claim or demand for the recovery of which the said warrant of distress was issued."

The United States appealed to the Circuit Court of the District of Columbia, where a motion was made by *Mr. R. S. Coxe*, to dismiss the appeal, and contended that this was a summary proceeding in derogation of common right, and the jurisdiction must be limited to the express provisions of the act which gives the remedy. It does not give the United States any right to appeal.

The District Court had no jurisdiction in any suit against the United States. This proceeding is not a suit. No judgment can be rendered in it against the United States. It is not such an action as is intended by the Judiciary Act of 1789, [1 Stat. at Large, 73], where an appeal is given. It is a power given only to the judge, not to the court; and it is given to the judge of any district. A district judge in Georgia may enjoin a warrant levied in this district. There can be no jury to ascertain facts. It is no

action. It is like the case of claimants in Missouri, &c., a special commission; and the power given to the chancellor in bankruptcy. The jurisdiction begins and ends in the statute which gives it. There can be no appeal because none is given by the statute. In lunacy, the authority is personal in the chancellor. The appeal is to the king in council; not to the House of Lords. It is to the king as *parens patriæ*. *Sheldon v. Aland*, 3 P. Wms. 107; *Saul v. Wilson*, 2 Vern. 118; 2 Maddock, 446. In *Bullock's case* in the District Court of the United States in Georgia, the Circuit Court decided that no appeal lies under the Act of 15th May, 1820.

Mr. Swann and Mr. Key, contrà. This is a suit or action. The bill prays for an injunction, and for general relief. The Judiciary Act of 1789, [1 Stat. at Large, 73,] gives an appeal, or writ of error, in all cases over \$50. It applies to new jurisdictions as well as to the old. If the District Court should dismiss the bill or final hearing, it would be hard if the debtor could not have an appeal. So it is strange if the legislature should give a right to appeal upon an interlocutory decree and not upon a final decree; and should give the complainant a right of appeal upon an interlocutory decree, and not reserve to the United States a right to appeal upon a final decree against them. The fourth section says, "The same proceedings shall be had as in other cases." An appeal is expressly given upon refusing or dissolving the injunction, because a decree of refusal or dissolution is only an interlocutory decree; and an appeal, by the former law, could only be taken to a final decree. And the allowing of such an appeal from an interlocutory decree, does not deprive the party of his appeal upon a final decree. By the Act of the 3d of March, 1803, [2 Stat. at Large, 244,] an appeal is given upon every final decree. A decree for a perpetual injunction is a final decree. This is the judgment or decree for a court, and being in its nature final, an appeal lies of course under the Act of 1803. The COURT (CRANCH, C. J., not sitting,) was of opinion that the United States had a right to appeal; and on a subsequent day, THRUSTON, J., delivered the opinion of the Court, (CRANCH, C. J., not sitting on the appeal.)

The great question, in this cause, is, "Is the appellee, as agent for the disbursement of certain contingent funds of the Treasury Department, library of Congress, and other appropriations for public purposes, entitled to compensation for those disbursements? It is a single and a simple question; and can admit of no doubt, if the defendant be not barred by considerations connected with and growing out of his official duties as register of the treasury. The first point, then, is to examine those official duties. (See the law declaring those duties.)

Here we see his duties as register, defined, among which we cannot discern that of receiving and paying public moneys. It is plain that he was not bound, as register, to receive or pay away public moneys, but he has, for a long course of years, received, paid away, and accounted for very large sums of public money. This must have been an extra duty, in nowise incident to his office of register. How came Mr. N. to have this duty imposed on him? We are told in the certificate of Oliver Wolcott, in the year 1801, that Mr. Nourse had been "employed" as agent for defraying the incidental and contingent expenses of the Treasury department. Here we have evidence of the way in which Mr. Nourse became agent. He was "employed." This is a strong expression, and deserves consideration. It carries with it the idea, and almost the essence of a contract. What other more forcible expression would have been used if a contract had been made with any private person? If the secretary had a right to require this duty of Mr. Nourse as register, would he have used the term "employed"? Would he not rather have said, Mr. Nourse has been required, ordered, directed, or appointed? Suppose Mr. Nourse had refused the agency, would there have been any violation of his official duty? None whatever. Then one of two consequences follow. This burthensome agency, (for that it was onerous and troublesome is proved by the depositions of Mr. Michael Nourse, Mr. Charles J. Nourse, Mr. Rush, Mr. Crawford, and the certificate of Mr. Wolcott,) was undertaken gratuitously, or compensation was expected. Was it undertaken gratuitously? That it was not is proved by the intended application to Congress for compensation, as far back as 1801, as appears by the memorial to Congress exhibited in the argument, with Mr. Wolcott's certificate indorsed. Then it is evident Mr. N. expected compensation, and the then Secretary of the Treasury was apprised of it. Here was notice that Mr. N. expected compensation; and, of course, he acted neither gratuitously nor under the impression that he was, in executing this agency, discharging any duty belonging to his office of register, but an extra duty for an expected compensation.

But it is contended that if Mr. N. is entitled to compensation, it is a right founded upon no law, and dependent entirely upon the will of Congress. A right not to be asserted in a court of law, is a solecism. A strange argument has been used to maintain this principle, — that because Mr. Nourse proposed to apply to Congress for remuneration, he has acknowledged that he had no legal remedy. How so? Does a man forfeit his right to compensation for services rendered because he has misconceived his remedy? But how did he misconceive his remedy? He could not have

sued the government ; and therefore had no means to enforce his claim in a court of law. But it is asked, why did he not prefer his accounts to the treasury department at the time he thought of the memorial to Congress ? Because, in the first place, he might have been, and probably was ignorant of his rights, or apprehended that the Secretary of the Treasury had no power to allow them ; or he might have been apprehensive of giving offence to the government, and as he was a removable officer, that he might have endangered his office of register ; and, moreover, as he had always large sums of public moneys in his hands, there was, in fact, but little necessity for having the legal point settled at that time. But, for none of these causes can I discern that he has waived or forfeited his right to compensation. Admitting, then, that Mr. Nourse was doubtful, at that period, of his claim to compensation, little doubt exists, at this day. The practice that has uniformly prevailed since, in transactions of this nature, has settled the point. The opinion of Mr. Wirt in *Governor Cass's case* ; the allowance by Colonel Bomford for extra services of this sort rendered by army officers ; of General Gratiot, by engineer officers, all go to show compensation for extra services in disbursing money by officers who receive regular pay as such ; and in private transactions compensation by way of commissions to agents receiving and disbursing moneys, is too well settled to be disputed. Then if Mr. Nourse always expected compensation for this extra service, and the government was apprised of it in 1801, (see O. Wolcott's certificate,) and he has not forfeited it, as I have endeavored to show, by either ignorance of his rights, or by not asserting them sooner, because, having, as I observed, already large sums in his hands, and had, until now, no necessity to assert them, I see no reason why he is not entitled now to this compensation ; and in this I am supported by Mr. Crawford, late Secretary of the Treasury ; and as two and a half per centum is the rate of allowance established for similar services, (see Bomford and Gratiot's certificate,) and has been reported reasonable by the auditors, whose report stands unexcepted to, I am of opinion that the decree of the district judge should be affirmed by this Court.

A strange argument was used to show that Mr. Nourse would have had the same duties to perform as register, had he not acted as agent, as he has had, having acted as such ; that he would still have had the accounts of the agency to register and enter on the books of his office, and so as register he would have had this duty to perform let who will have been agent ; and he had all this to do, although he was himself the agent. But, in fact, the concerns of the agency are entirely distinct from and independent of his functions as register. What have contracts for wood, paying

superintendents of buildings, watchmen, paying drafts of the library committee for books purchased, paying painters, glaziers, carpenters, bricklayers for work done on the public offices, and the multifarious and innumerable private claims on the contingent fund, and many of these payments, and indeed most of them, not in office hours, drawing checks, &c. &c., keeping private books of these transactions, producing vouchers for every, even the smallest payment in settling his accounts, to do with his duties as register of the treasury? Nothing. They are entirely distinct.

But Mr. Nourse was "employed" to do all this; and if he was employed, why should he not be paid? If no special contract was made, then he is entitled, on the principle of a *quantum meruit*, which creates an implied assumpsit, to pay, on the part of the government, and the quantum of two and a half per cent. is settled by the usage established by other officers of the government in similar cases; by the report of the auditors and by all the analogies to the cases of private agents.

As to the statute of limitations; in the first place, it is not pleaded; in the next place, it cannot avail against a party who could not assert his claim by law. Mr. Nourse could not sue the government; therefore could not avoid the operation of the statute. He was obliged to wait to be sued. Besides, we are bound to decide on principles of justice and equity. The statute, if otherwise available of, seems to be overruled by this directory provision. But the government would be disgraced by pleading the statute of limitations, and if so, we ought not to allow it.

Moreover, the policy of the statute, however wise and wholesome as to transactions between private persons, is in nowise applicable to government concerns. The prevention of litigation, the peace and quiet of the community, and the security of the citizens against stale claims, were the objects of the statute; none of which seem at all to bear on the interests or the weal of the government; and therefore the government ought not, and cannot take shelter under it.

Again, the United States are not bound by the statute, and it is not right that they should have the benefit of it; the benefit should be reciprocal.

As to the want of a replication, it appears, from the record, that a general replication was agreed to be filed, in the judge's order of the 2d of January, 1831, (see p. 7, of the record; see also the final decree of the judge,) who says, "The cause coming on for final decision, on said report, and the bill, answer, replication," &c., "admitted by the parties," so that there appears to have been a replication.

The decree of the District Court is affirmed.

United States v. Schwarz.

Reversed by the Supreme Court of the United States, 6 Peters, 470, on the ground that the United States had no right to appeal from the District to the Circuit Court; which, in effect, affirmed the judgment of the District Court.

UNITED STATES v. CONRAD SCHWARZ.

The obstruction of a way laid out for the accommodation of the owners of certain lots, by the original proprietor thereof, and not as a common highway, is not properly the subject of indictment; and the circumstance that the public might pass over a road, does not make it a public road, although laid off and dedicated by the original owner of the land as a public road, and ever since used as such.

There can be no public road in the county of Washington, D. C., out of the cities and towns, unless it be recorded as such in this Court or the Levy Court.

CONRAD SCHWARZ was indicted for obstructing a public highway.

Mr. Key, for the defendant, contended that it was only a private way for the accommodation of those who purchased lots of General Forrest. There can be no highway in Maryland unless it be of record, and to be repaired by the county; and he cited the Maryland Act of 1785, c. 49, respecting private ways; 3 Har. & Johns. 436, and the Maryland Act of 1704, c. 21, for the marking and recording of public roads.

Mr. Swann, for the United States, *contrà*, cited *The King v. Lloyd*, 1 Campbell, 260; *Daniel v. North*, 11 East, 375, and 1 Hawk. 366.

Several deeds were produced, and read to the jury, from General Forrest to sundry persons bounded by this road, calling it a public road as laid out by Archibald Orme.

The COURT (THRUSTON, J., *contrà*,) instructed the jury at the prayer of the defendant's counsel, that if they should be satisfied by the evidence, that the road was laid out or reserved by General Forrest, in selling out the lots of his land, as a road for the accommodation of the lot-holders under his sales, and not as a common highway, then the obstructing of the road is not properly the subject of indictment. And further, that if they should be satisfied by the evidence, that the road was intended and laid out by General Forrest for the accommodation of the lot-holders who purchased under him, then the circumstance that the public might pass over it, does not make it a public road.

Mr. Swann, then prayed the Court to instruct the jury, that if they should be of opinion that it was laid off and dedicated by U. Forrest, the original owner of the lands through which the said road passed, as a public road, and has been, ever since, used as such, then it would be competent for the jury to consider it a public road and common highway.

 Denney v. Elkins.

But the COURT (THRUSTON, J., *contra*,) refused to give that instruction; but instructed the jury that there could be no public road in this county, out of the cities and towns, unless it be recorded as such in this Court or the Levy Court. See the Maryland Act of 1704, c. 21.

Verdict for the defendant.

JOHN R. DENNEY v. JERE ELKINS.

An action cannot be maintained upon a promissory note given upon a wager that A. J. would not obtain the electoral vote of the State of Kentucky for the office of President of the United States, the consideration being illegal, although the parties themselves were not qualified to vote at the election; and because such a contract tends to draw in question the validity of the election of the chief magistrate of the nation.

THIS was an appeal from the judgment of a justice of the peace given against the appellant upon a promissory note to the appellee, upon a wager that Andrew Jackson would not have the electoral vote of Kentucky for the office of President of the United States.

Mr. Wallach, for the appellant, contended that the consideration was illegal, and cited *Bland v. Collett*, 4 Camp. 158, note; *Lansing's case*, 8 Johns. 454; *Bunn v. Riker*, 4 Johns. 426; *Vischer v. Yeates*, 11 Johns. 23; *Atherfold v. Beard*, 2 T. R. 615; *Cotton v. Thurland*, 5 T. R. 405; *Lacaussade v. White*, 7 T. R. 535.

Mr. Coxe, for the appellee, cited *Denniston v. Cook*, 12 Johns. 376; *Allen v. Hearn*, 1 T. R. 56; *Andrews v. Herne*, 1 Levinz, 33, and *Yeates v. Foote*, 12 Johns. 12.

CRANCH, C. J., delivered the opinion of the Court, (*nem. con.*)

This is an appeal from the judgment of a justice of the peace in a suit brought by the appellee against the appellant upon a promissory note given by the appellant to the appellee, upon a wager that Andrew Jackson would not obtain the electoral vote of the State of Kentucky for the office of President of the United States.

The note was made in the District of Columbia, in October, 1828, and before the electoral vote was given; the appellee and the appellant being, at the time of the wager, both residents and citizens of the District of Columbia, and neither of them having a right to vote in the election of electors for President in any part of the United States.

It is objected that the note is void, because the wager was illegal, as being contrary to the principles of public policy upon which our elective governments are founded.

If the parties, or either of them, had been qualified to vote at

the election, it is clearly settled that the wager could not be enforced by a court of law.

The only doubt, in this case, arises from the fact that neither of the parties was qualified to vote at that election. It is contended that the reasons, given by the courts which have decided such wagers to be illegal, rest mainly on the ground that one of the parties, at least, was a legal voter.

There is a case cited in the books from 1 Lev. 33, (*Andrews v. Herne*,) where a wager was laid "that Charles Stuart would be King of England within twelve months next following," he being then in exile.

After verdict for the plaintiff, it was moved in arrest of judgment, that there was no consideration; for he was King of England at the time of the promise.

But the Court said that the consideration was good; for the words must be taken according to the subject-matter; and that being out of possession at the time of the promise, it must be understood to be, that if the king shall be in possession within twelve months.

No objection was made that it was against public policy, nor was any intimation of such an objection made by the bar or the bench. It is therefore a case not at all applicable to the present question; unless the absence of the objection may be considered as an argument against its validity. But Mr. Justice Buller in *Good v. Elliot*, 3 T. R. 697, said, he presumed no one would say that an action could now be maintained on any bet of that kind. The principle, that a wager against public policy is void, has been, since, conclusively established; and the question, now, in all these cases, is, whether the circumstances of the case bring it within the general principle. In the case of *Jones v. Randall*, Cowp. 39, Anno 1774, Lord Mansfield said, "many contracts which are not against morality, are still void, as being against the maxims of sound policy." But, in considering whether the wager in that case, (which was, "whether a decree of the court of chancery would be reversed on appeal to the House of Lords,") was void because contrary to the principles of morality, he puts the case of a person who was a candidate for a bishopric laying a wager, with a person of great influence at court, that he would not have the bishopric. So he says that if, in the case then before the court, the wager had been made with one of the judges, or one of the lords, it would have been a bribe; or, even, if it had been a wager laid with the attorney or counsel in the cause. The court was of opinion, that the wager was neither against morality nor public policy. But, in delivering the opinion of the court, Lord Mansfield said, "But it is argued, and rightly,

that notwithstanding it is not prohibited by any positive law, nor adjudged illegal by any precedents, yet it may be decided to be so upon principles; and the law of England would be a strange science indeed if it were decided upon precedents only.

“Precedents serve to illustrate principles, and to give them a fixed certainty. But the law of England, which is exclusive of positive law enacted by statute, depends upon principles; and these principles run through all the cases according as the particular circumstances of each have been found to fall in with the one or the other of them.”

The case of *Allen v. Hearn*, 1 T. R. 56, was upon a wager between two voters with respect to the election of a member of parliament. The bet was made before the poll began. This wager was adjudged illegal, as being against public policy.

The case of *Jones v. Parry*, cited in 1 T. R. 58, 59, was a bet upon the Bristol election, and was tried before Lord Mansfield at Guildhall. There it did not appear whether the parties were voters or not; for the moment Mr. Wallace had opened the case, Lord Mansfield thought it was a color for bribery, and nonsuited the plaintiff.

In the case of *Allen v. Hearn*, 1 T. R. 59, Lord Mansfield said, “whether this wager had any other motive than the spirit of gaming and the zeal of both parties, I do not know; but this question turns on the species and nature of the contract; and if that, in the eye of the law, is corrupt and against the fundamental principles of the constitution, it cannot be supported by a court of justice.

“One of the principal foundations of this constitution depends on the proper exercise of this franchise; that the election of members of Parliament should be free; and particularly that every voter should be free from pecuniary influence in giving his vote.”

The case of *Atherfold v. Beard*, 2 T. R. 610, was upon a wager, whether the Canterbury collection of the duties upon hops in 1786 would exceed that of 1785.

In that case, Mr. Justice Ashurst said, “Now I am of opinion that the present case falls within the principle of those which have been determined not to be good. The courts have said that wagers should not be allowed which, in the event, may have an influence upon the public policy of the kingdom. On this principle, a wager on the event of an election for members to serve in Parliament was held to be illegal, because the persons laying the wagers were interested in altering the free course of election. The present wager, also, appears to me to fall under the same class of objection, because it is against the same policy of the kingdom.”

“The plaintiff’s counsel have admitted that the officers of

excise were not bound to produce the public books. Now that goes the whole length of determining this cause; for if the wager be such that the best evidence by which it must be proved is improper to be admitted, that circumstance shows that the wager is in itself illegal."

Mr. Justice Buller, in the same case, said, "This is the case of an idle wager between two persons who have no concern in the subject, to draw into question a matter that respects the interest and general importance of the country; and on that ground I think the wager illegal. I do not find that it has been established as a position of law, that a wager between two persons not interested in the subject-matter, is legal. But this wager could not be proved without searching the books relating to the revenue of the country; and I am glad to find that in the only two cases where this question has arisen at *Nisi Prius*, Lord Mansfield and my brother Ashhurst, were both of opinion that the officers were not bound to produce the revenue books."

It may be observed, that although in that particular case (*Atherfold v. Beard*,) the defendant had confessed that he had lost the wager, and, therefore, it was not necessary to produce the revenue books in evidence, yet, as the books would have been the best evidence, and must have been produced to support the action, if the fact had not been admitted by the defendant, and as public policy prohibited the production of those books, the court thought that circumstance conclusive of the illegality of the wager. It was observed, also, by Mr. Justice Buller, that "what Lord Mansfield said in the case of *Murray v. Kelly*, was applicable, when he said that that wager was good because it was on a private event; from whence it is to be inferred that, in his opinion, it would have been void had it been on a public event."

The principle, upon which the case of *Atherfold v. Beard* was decided, was, that the wager was against the public policy of the kingdom; and it was against the public policy because it brought into discussion, in a judicial tribunal, at the will of individuals having no particular interest in the subject, matters concerning the public revenue which the government might think it improper to disclose, and which could only properly be discussed in parliament, and required the production of evidence which could be properly called for by parliament only.

In the case of *Good v. Elliot*, 3 T. R. 699, Mr. Justice Buller said, "I take it to be agreed by my brethren, from whom I have the misfortune to differ, that if the wager concern the interest of the public, or impute a crime or disgrace to another person, it is void, and cannot be made the subject of an action." And in p. 700 he says, "it is established, that if the action lead to improper inquiries, it may be stopped *in limine*."

The same point was afterward adjudged by the Common Pleas in *Shirley v. Sankey*, 2 B. & P. 130.

In the case of *Lacausade v. White*, 7 T. R. 535, the wager was whether articles forming the basis of a treaty of peace between England and France, would not be signed before the 11th of September, 1797; and it was admitted that the wager was illegal; and no doubt on the same ground.

In *Bunn*, plaintiff in error, v. *Riker*, 4 Johns. 426, the wager was between two voters, Riker and Graham, upon the event of the election of governor of the State of New York.

Riker had voted the day before the wager; Graham had not, and probably was too far from the place where he was entitled to vote at that election. The defendant, Bunn, was the stakeholder. Riker, the plaintiff, was the winner of the wager. This wager was adjudged illegal upon the ground that it was against the principles of sound policy, because it involved an inquiry into the validity of the election of the chief magistrate.

Judge Van Ness observed, "It is enough that this wager may give birth to such a question, to pronounce it to be repugnant to the dictates of good policy. The discussion, to which it gives rise, ought to be discouraged, unless the public good, or the due administration of justice, renders it unavoidable. It is a discussion calculated to endanger the peace and tranquillity of a community already sufficiently heated and agitated." The wager was also decided to be against sound policy because it created a corrupt interest in the voters themselves.

Judge Spencer, however, although he admitted that a wager against public policy is void, did not concur in the opinion of the Court, that that wager was against public policy; because he thought that it could not bring into question the validity of the election, since the statute renders the decision of the canvassers conclusive and final; and because, as Riker had already voted, and Graham was not in a situation where he could exercise his right of voting, the vote of neither could be influenced by the wager.

The principle of that case was confirmed in the case of *Lansing v. Lansing*, 8 Johns. 454, where the wager was upon the election of governor of New York, after the close of the poll; and each party deposited his note with a third person. After the event was known, the notes were delivered to the winner, who indorsed to the plaintiff the defendant's note after it was payable.

The court said, that the case was within the principle decided in *Bunn v. Riker*, that a bet involving an inquiry into the validity of the election of governor, was void, on principles of policy, and reversed the judgment which had been rendered below for the plaintiff.

Denny v. Elkins.

In the case of *Vischer v. Yates*, 11 Johns. 23, the action was against the stakeholder, to recover the money deposited by the plaintiff in a wager upon the election of governor.

After the event of the election was generally known, but before the money was payable according to the terms of the wager, the plaintiff gave notice to the defendant not to pay over the money.

The Court sustained the action, upon the ground that the wager was against the principles of public policy. In that case, the bet was made before the election, and all the parties were legal voters at the time of the election.

Kent, C. J., in delivering the opinion of the court, said, "In this case, the parties referred to the decision of the canvassers as the true and only test of the determination of the bet; and that test had not been given when the money was demanded of the defendant; the risk had not been run, and determined within the purview of the contract. This objection, however, was founded upon a strict construction of the contract; and, though it would be sufficient to avoid much of what was urged on the part of the defendant, yet we choose rather to place the decision of this case upon those great and solid principles of public policy which forbid this species of gambling, as tending to debase the character and impair the value of the right of suffrage."

Although the judgment in that cause was reversed in the Court of Errors and Appeals, yet it seems, by the opinion of the only senator whose opinion is reported, that it was upon the ground that the plaintiff, by depositing the money in the hands of the stakeholder, had executed the illegal agreement on his part, and could not recall it, because "*in pari delicto melior est conditio possidentis*; and *fieri non debet, sed factum valet*."

The general principle, running through all the cases, is, that a contract, which it would be contrary to the maxims of sound public policy to enforce, is void at law. It is one of the maxims of sound public policy in all elective governments, that elections should be pure and free. Any contract which would tend to substitute a corrupt for a patriotic motive to influence a vote either directly or indirectly, would be contrary to that maxim. It is not necessary that it should operate directly as a bribe to a voter. If it create a contingent pecuniary interest, dependent upon the event of the election, it operates as a corrupt motive to influence that election; and whether the influence of the party be more or less, the violation of the principle is the same, and equally affects the validity of the contract. It is the nature and tendency of the contract, not the degree of mischief which it may effect, that decides its validity. Although the parties may not be qualified voters, yet their means of influencing the election may be very

great. They may form themselves into clubs or committees, and by exciting the passions, by holding up the promise of their influence in obtaining offices for those who seek them, or by denouncing those already in office ; by circulating false reports, by hiring writers and printers to extol their candidate and slander his opponent, and by many other means, may have actually as much influence in the election as if they were, themselves, qualified voters.

The maxim, being founded on the tendency of the contract to produce the public mischief, must be as extensive in its operation as the mischief itself.

This is one great advantage which common law has over statute law, that being bottomed upon the mischief, it follows it through all its forms ; whereas statute law is confined to the cases which it describes.

So far as the influence used in an election is prompted by a pecuniary motive, so far it is corrupt, and in violation of the maxim, that elections should be pure. No vote can be perfectly pure which is not given exclusively with a view to the public good. Nor can the use of corrupt means be justified by the belief of him who uses them, that the end is the public good.

We are, therefore, of opinion that the contract in question was contrary to the maxims of the public policy upon which our elective government is founded, and, therefore, void in law, although the parties themselves were not qualified to vote at the election.

There is another principle of public policy also, which may, perhaps, render this contract void ; namely, that it tends to draw into question, in a judicial tribunal, the validity of the election of the chief magistrate of the nation, and to require the production of evidence which it might be inconvenient, if not improper, for the government to furnish.

Upon this point, however, the Court is not so clear, and, therefore, rests its decision mainly upon the tendency of such contracts to introduce corruption into our elections.

The judgment must be reversed, with costs.

NEGRO THOMAS BUTLER *et al.* v. GABRIEL DUVAL.

Slaves removed by their owner from Maryland, or Georgetown in the District of Columbia, to Virginia, and kept therein one whole year, are entitled to freedom under the law of Virginia, unless the owner took the oath prescribed by that law within the time thereby limited ; but after the lapse of twenty-five or thirty years, the jury may presume that such oath was taken as prescribed, and within the limited time. Slaves carried by the owner from Virginia to Maryland, with intent to reside therein, are entitled to freedom.

If slaves be removed by their owner from Virginia to the county of Washington, D. C., and there sold within three years after such removal, the jury may infer that they were imported for sale, and if so, they are entitled to freedom.

THIS was a petition for freedom.

Upon the trial the following instructions were given by the Court to the jury :

1. Upon the prayer of *Mr. Coxe*, for the petitioners, — That if the jury shall believe, from the evidence aforesaid, that Dales was the owner of the petitioners, or their parents, in the State of Maryland, or in Georgetown in the District of Columbia, and resided with them there, and subsequently removed to Virginia, and kept them in that State, one whole year together, that then the said petitioners are entitled to their freedom under the law of Virginia, unless the said Dales, within the time specified in the Virginia law, complied with the requisitions of that law by taking the oath therein prescribed.

2. But, at the prayer of *Mr. Jones*, for the defendant, further instructed them, that if they believe from the evidence that such removal, to Virginia, of the said slaves, was more than twenty-five to thirty years before the bringing of this petition ; that during all the time the said Dales lived, whether in Virginia, in Maryland, or in the District of Columbia, the petitioners were continually held and used as slaves, either by the said Dales or by the defendant as purchaser from him ; that the said slaves were purchased by said Duvall of the said Dales more than twenty years before the bringing of this petition, and have been held by him, as slaves, by virtue of that purchase, ever since ; and that the said Dales died some years before the filing of this petition, then it is not necessary for this defendant to offer further evidence to prove a compliance, on the part of said Dales, with said requisitions of the Virginia law, but such compliance may be presumed ; and the burden of proving the contrary thrown on the petitioners.

3. On the prayer of *Mr. Coxe*, for the petitioners, that if the jury shall believe from the evidence aforesaid, that the said Dales, owner of said petitioners as aforesaid, resided with the said petitioners in Virginia, and sold them while he so resided, to the defendant, whether said sale was made in Georgetown or in Virginia, the defendant then residing in Washington county, D. C., who then carried said slaves to Prince George's county, with intent to reside therein, then the petitioners are entitled to their freedom.

And in such case, if the said slaves and their master resided in the State of Virginia, and their said master removed with them to the District of Columbia, and sold them within three years after

Duvall v. Wright.

such removal, then the jury may infer that the said slaves were imported with intent to sell them; and if so they are entitled to their freedom.

Mr. Jones, in support of his prayer (No. 2,) cited *Matilda v. Mason*, in this Court, at October term, 1821, (2 Cranch C. C. 343,) and S. C. 12 Wheat. 590, on writ of error; *Murray v. McCarthy*, 2 Mun. 393; *Abraham v. Matthew*, 6 Mun. 159.

Verdict for the petitioners. Motion for new trial, overruled. No writ of error taken.



BENJAMIN DUVAL, Administrator of Ann Jackson, v. THOMAS C. WRIGHT.

If the plaintiff's surety for costs in *scire facias*, die, pending the suit, the Court, on motion, will require new security, although the administrator of the former surety may have assets.

After the issue joined upon *nul tiel record*, and the cause is called for trial on that issue, the Court will not permit the defendant to plead that the plaintiff was never administrator.

SCIRE FACIAS; *nul tiel record*, and issue made up under the general authority given to the clerk by the attorneys of this Court, to make up their issues. W. Emack was surety for costs.

Mr. Redin, for the defendant, suggested the death of Mr. Emack, and demanded new security for costs. The Court suggested, that perhaps Mr. Emack's administrator had assets.

Mr. Redin said that the defendant was entitled to security not dependent upon assets.

The COURT yielded to that suggestion, and Mr. R. P. D. became surety.

Mr. Redin then asked leave to plead that the plaintiff is not administrator; and cited *North v. Clark*, in this Court, at May term, 1827, (3 Cranch, C. C. 93,) in which this Court decided that the defendant had a right to demand oyer and plead that the plaintiff is not administrator, at any time before the expiration of the rule to plead.

But the COURT (THRUSTON, J., doubting,) refused now, at the trial court, when the cause is called for trial on the issue of *nul tiel record*, to permit the plea to be filed, unless the defendant will make oath of the fact that the plaintiff is not administrator, considering it only a temporary bar; and CRANCH, C. J., doubting whether the plaintiff is bound to have his letters of administration in court at this term to give oyer so long after *profert*, and when the only issue he came prepared to try, was *nul tiel record*.

JOHN ALLEN v. E. T. ARGUELLES.

A transcript of a judgment and proceedings of a justice of the peace in Pennsylvania, entered of record in a county court, is not a judgment of that court.

DEBT upon the judgment of the county court of Philadelphia county in Pennsylvania; plea, *nul tiel record*, and issue.

The plaintiff produced a certificate under the seal of the county court, that a transcript of a judgment and proceedings before a justice of the peace, was filed and entered of record in that court.

The COURT, (THRUSTON, J., doubting,) was of opinion that the judgment of the justice at his chambers, a transcript of which was filed and entered in the records of the county court, was not a judgment of the county court, although the prothonotary of that court was authorized by statute to issue a *feri facias* thereon to bind lands.

Mr. Lear, for the plaintiff.

Mr. Wallach, for defendant.

JOHN EDDDS v. JOHN WATERS.

Upon a demurrer to a declaration in slander, if any of the words are actionable the judgment must be for the plaintiff.

IN SLANDER, the defendant demurred to the whole declaration, which consisted of one count only, containing three distinct charges. 1st. That the plaintiff was a rogue, thief, and murderer. 2d. That he was a rogue; and 3d. That as keeper of the Georgetown penitentiary he suffered a negro-buyer to escape for a bribe.

CRANCH, C. J. The defendant, having demurred generally to the whole declaration, consisting of a single count containing three distinct charges, if any one of them is actionable, the plaintiff must have judgment; for if the defendant wished to prevent the plaintiff from recovering damages for the words not actionable, he should have demurred to so much of the declaration as charges him with speaking those words.

But having, by his demurrer, admitted that he spoke all the words charged in the declaration, and some of them being actionable, the plaintiff must have judgment for the whole.

THRUSTON, J., and MORSELL, J., concurred.

UNITED STATES v. JANE BYERS.

Upon the trial of an indictment for stealing a note of the Bank of the United States, it is not necessary that the United States should prove that it was a genuine note of that bank, otherwise than by producing the note itself; nor that it was the note of a chartered bank.

Mr. Hellen, for the prisoner, required that the United States should strictly prove that it was a genuine note of the bank; and cited 2 Starkie on Ev., Am. Ed. 829 in the note, which refers to the case of the *State v. Tillery*, 1 Nott & McCord, 9; and Russell on Crimes, 1032, Am. Ed.

But the COURT (CRANCH, C. J., doubting,) stopped the Attorney of the United States and said, that the note itself, being proved to be the note stolen, is *primâ facie* evidence of what it purports on its face, to be.

Mr. Hellen then contended that the United States must prove it to be a note of a chartered bank.

But the COURT (CRANCH, C. J., doubting) said, that the ninth section of the Penitentiary Act only required that it should be a bank-note.

 NEGRO EMANUEL GILBERT v. HORATIO WARD.

On a petition for freedom under a will, the burden of proof is on the respondent to show that the petitioner was more than forty-five years of age, or that the manumission was in prejudice of creditors.

PETITION FOR FREEDOM, under the will of Peter Dejean.

Mr. Tabbs, for the defendant, objected, at the trial, that there was no evidence that the petitioner was "under the age of forty-five years," when his title to freedom accrued. If he was over forty-five, he is not entitled to his freedom. It is a necessary part of his title, and he must prove it; see Maryland law, 1796, c. 67, § 13, by which it is enacted, "that no manumission, hereafter to be made by will, shall be effectual to give freedom to any slave or slaves, if the same shall be in prejudice of creditors, nor unless the said slave or slaves shall be under the age of forty-five years, and able to work and gain a sufficient livelihood at the time the freedom given shall commence."

Mr. Wallach, contra. In the case of creditors, this Court has decided that the burden of proof is on them to show that the circumstances of the estate of the deceased are such as that the manumission would be to their prejudice.

Mr. Tabbs, in reply. The cases are different. Here the age is part of the plaintiff's title.

Negro Kitty v. M'Pherson.

The COURT (THRUSTON, J., absent,) was of opinion, that under the 13th section of the Act of Maryland, 1796, c. 67, the manumission is *primâ facie* valid; and that the defect of age, which by the proviso is to render the manumission ineffectual, must be shown by the party who claims the petitioner as a slave.

Verdict for the petitioner.

 NEGRO KITTY v. SAMUEL M'PHERSON.

A slave manumitted by will, after a term of service, is not free until the term of service has expired, but the Court will continue the injunction originally granted to prevent the removal of the petitioner from the jurisdiction of the Court, unless the defendant will give bond to the United States with good security that he will not suffer or permit her to be so removed.

THE petitioner claimed her freedom under the will of Mary Brooke, who directed that she should be free in the year 1840.

Mr. Key, for the petitioner, contended that she is now free, as her hire for the intermediate time is bequeathed to a particular legatee; and that the intention of the testatrix is to govern the case.

Mr. Wallach, contrâ. If she is now free, who can compel her to serve till her time of freedom shall arrive? But the petitioner never was the property of Mary Brooke.

He then prayed the Court to instruct the jury, that if they should believe from the evidence that the petitioner was not the property of Mary Brooke at the time of her death, they must find a verdict for the defendant; and that if they found that the petitioner was the property of Mary Brooke at the time of her death, still the petitioner is not entitled to freedom until the day of _____, 1840, the time limited by the will.

The COURT gave the first part of the instruction, and recommended, as to the other part, that they should find specially, if such should be their opinion, that the petitioner was the property of Mary Brooke at the time of her death, and will be entitled to her freedom on the _____ day of _____, 1840.

And the jury found according to that recommendation.

Whereupon, the COURT ordered the original injunction to be continued, restraining the defendant from removing the petitioner from the jurisdiction of this Court; unless the defendant would give bond and good security in the penalty of \$600, not to remove the petitioner, &c., which bond and security were given; but judgment at law was ordered to be entered up for the defendant upon the verdict.

UNITED STATES v. JOSEPH LAFONTAINE.

An indictment against the domestic servant of a foreign minister quashed for want of jurisdiction.

JOSEPH LAFONTAINE was indicted for an assault and battery upon Edward Cowen.

Mr. Dandridge, for the defendant, moved the Court for a rule on the Attorney of the United States to show cause why the indictment should not be quashed, on the ground that the defendant was the domestic servant of the Baron Stackelberg, chargé d'affaires of his majesty the King of Sweden and Norway, and that the Supreme Court of the United States alone has jurisdiction of proceedings against foreign ministers and their domestics.

This motion was supported by an affidavit of *Mr. Dandridge* that he had often seen the defendant in the employ of the Baron Stackelberg as a domestic servant, and that he had received from the Baron a letter, which is annexed to his affidavit, in which the Baron informs him that his cook, Joseph Lafontaine, has been indicted in the Circuit Court of this district and county for an assault and battery; and requesting *Mr. Dandridge* will see that the defendant is proceeded against according to the laws of the United States and the laws of nations.

Mr. Dandridge also produced a certificate from the Department of State that the Baron is, and has been ever since his residence here, chargé d'affaires of his majesty the King of Sweden and Norway, near this government, and that he is fully acknowledged and accredited as such by the President of the United States.

Mr. Dandridge also cited the Judiciary Act of 1789, § 13, [1 Stat. at Large, 73,] and Arch. Crim. Pleading, 45, 46.

All which appearing upon the return of the rule, and no cause to the contrary being shown, the following order was made and entered on the minutes of the Court:

The COURT being satisfied by the affidavit of John Dandridge, filed in this cause, that the defendant was at the time of the supposed offence, charged in the indictment, a domestic servant of the Baron Stackelberg, chargé d'affaires of the King of Sweden and Norway, received and accredited as such by the President of the United States; and that, therefore, this Court has not jurisdiction of the cause: It is therefore ordered that the indictment be quashed.

JAMES D. WOODSIDE, Appellant, v. ETHAN BALDWIN, Appellee.

A physician, practising in Washington, D. C., without a license from "the Medical Society of the District of Columbia," may maintain an action at law for his services, if, during the the time of those services, there was no existing "Medical Board of Examiners of the District of Columbia."

THIS was an appeal from the judgment of a justice of the peace for the county of Washington in favor of the appellee, for \$48, for the balance of an account for medical attendance and services from March, 1829, to March, 1830.

Upon the appeal, one of the parties demanded a trial by jury, who found a verdict for the appellee for the amount claimed, subject to the opinion of the Court upon the question whether the appellee had a right to maintain an action for his medical services without having obtained a license, or diploma, as required by the 5th section of the charter of the Medical Society of the District of Columbia, granted by the Act of Congress of the 16th of February, 1819, [6 Stat. at Large, 221,] entitled "An Act to incorporate the Medical Society of the District of Columbia."

The 3d section of the charter provides, "That it shall and may be lawful for the said Medical Society, or any number of them attending (not less than seven,) to elect by ballot five persons, residents of the District, who shall be styled 'the Medical Board of Examiners of the District of Columbia;' whose duty it shall be to grant licenses to such medical and chirurgical gentlemen, as they may, upon a full examination, judge adequate to commence the practice of the medical and chirurgical arts, or as may produce diplomas from some respectable college or society; each person so obtaining a certificate, to pay a sum not exceeding ten dollars, to be fixed on or ascertained by the society."

By the 4th section, any three of the examiners shall constitute a board for examining candidates; and any one of the examiners may grant a license to practise until a board can be held.

By the 5th section it is "enacted that after the appointment of the aforesaid medical board, no person, not heretofore a practitioner of medicine or surgery within the District of Columbia, shall be allowed to practise within the said District, in either of the said branches, and receive payment for his services, without first having obtained a license, testified as by this law directed, or without the production of a diploma as aforesaid, under the penalty of fifty dollars for each offence, to be recovered from the county court where he may reside, by bill of presentment and indictment, one half for the use of the society, and the other for that of the informer."

By the 2d section the officers, namely, president, two vice-presidents, one corresponding secretary, one recording secretary, one treasurer, and one librarian, were to be appointed at the annual meeting in January, forever; but no time was designated for the election of the board of examiners by the society.

It was proved or admitted, that there had not been any election of the officers of the society for several years, nor any proceedings by the society; and that there was no existing board of examiners during all the time of the appellee's services for the appellant.

Mr. Baldwin, for himself, contended, that the 5th section contained no prohibition of practice, and only gave a penalty to the society, which they only could recover by presentment or indictment; that his practice was not a *malum in se*, even if there had been a board of examiners to whom he could apply for a license. But there was no such board, and consequently he could not have offended against the 5th section of the charter, as it was impossible for him to obtain a license. Nobody has a right to interfere but the society. The act does not forbid any one to practise gratuitously, nor to receive fees without practising. The Maryland statute of 1798, c. 105, §§ 3, 4, 5, and 6, are exactly like the Act of Congress incorporating the society; and the Maryland Act of 1821, c. 217, shows that plaintiffs could, before that act, recover notwithstanding the Act of 1798, c. 105. (*Berry v. Scott*, 2 Harris & Gill, 92, in the year 1827.)

He contended also, that the society was not in existence. It had become extinct by *nonuser*. 2 Kent's Com. 238; *Head & Amory v. The Providence Insurance Company*, 2 Cranch, 127; *De Wolf v. Johnson*, 10 Wheat. 393.

Mr. Coxe, contra. The charter makes the practice and the receiving of payment therefor unlawful, and a contract to pay for such services cannot be maintained. The object of the 5th section of the act was the preservation of the public health; and although the corporation may not exist, yet that section remains in force. 2 Kent, 245 to 251.

But the corporation has never ceased to exist; and, if it had, the board of examiners would still remain. It is not subject to annual election, as the officers are.

But, if the corporation is extinct, the Maryland Act of 1798, c. 105, is revived, and the practice is unlawful under that act. The act of 1821, c. 217, only guards against surprise, by the defendant's availing himself of the defence given by the Act of 1798. It contains no prohibitory words.

The COURT (THRUSTON, J., absent,) affirmed the judgment, with costs.

Corporation of Georgetown v. Bank of the United States.

CORPORATION OF GEORGETOWN, District of Columbia, v. BANK
OF THE UNITED STATES.

Under the 10th section of the Act of Congress of the 26th of May, 1824, entitled, "An act supplementary to the act to incorporate the inhabitants of the city of Washington, passed the 15th of May, 1820, and for other purposes," the Corporation of Georgetown, District of Columbia, in the year 1826, had a right to sell real property in that town, for corporation taxes due thereon in the years 1819, 1820, 1821, and 1822, as well as for taxes due thereon in the years 1813 to 1819, inclusive.

THIS cause was brought before the Court, upon a case stated as follows:

"In the years 1813 to 1819, inclusive, John C. Baum was indebted to the Corporation of Georgetown, for the taxes charged on lots 55 and 56, in the account A, amounting to \$84.45, which taxes still remain due and unpaid, and there is no personal property of the said Baum wherewith to satisfy or pay the same. The said Baum continued to be the owner in fee of the said property till some time in the year 1826, when it was sold under a deed of trust, for the benefit of the Bank of the United States; and, at the said sale, the said bank became the purchaser, and now holds the title to the said property. In the year 1822, the Corporation of Georgetown passed the ordinance hereto annexed, marked B, and the said Baum, in pursuance to that ordinance, gave his notes, hereto annexed, marked C, for the said taxes; which notes are due and unpaid. The amended charter of the 26th of May, 1824, hereto annexed, marked D, is also made part of this statement.

"The liability of said bank, as owners of said property, to pay the said taxes and interest charged in the account A., to the said Corporation of Georgetown, is submitted to the Court. If the bank is liable, judgment for the amount of the account A, with interest and costs, to be rendered for the plaintiffs; otherwise, judgment for the defendants, with costs.

"JAMES DUNLOP, *for Corporation of Georgetown.*

"B. L. LEAR, *for Defendants.*"

"The ordinances of the corporation, levying taxes for the years 1813 to 1819, inclusive, are agreed to be made part of the above case.

"J. DUNLOP, *for Corporation.*

"B. L. LEAR, *for Defendants.*"

"The Bank of the United States is also the owner of various lots in Georgetown, purchased by them since the 26th of May, 1824, upon which arrears of taxes are due to the Corporation of Georgetown, accrued previous to the 26th of May, 1824, and previous to the bank's purchase, there being no personal property of the former owners to pay said taxes.

"And it is also submitted to the Court, whether, in cases so circumstanced, the Corporation of Georgetown can properly claim said arrears of taxes upon said real estate so purchased and held by the said bank, and enforce the same against the bank, as the owners thereof.

"J. DUNLOP, *for Corporation of Georgetown.*

"B. L. LEAR, *for Defendants.*"

By the by-law, or ordinance, marked B, and approved on the 15th of June, 1822, it was ordained that the collector be authorized and directed to receive from any persons in arrears for taxes due the corporation, prior to the year 1820, the amount of such arrears in promissory notes, payable as follows, &c. : if over \$40, in six, twelve, and eighteen months, with interest; "which are understood and declared to be secured by the property which is now bound for the payment of said taxes."

By the 4th section of the same ordinance, it is further ordained, "That where persons do not avail themselves of the indulgence hereby allowed, by passing their notes to the said collector within three months from this time, he be, and is hereby authorized and directed to collect the taxes due, by sale of the property, first giving the usual notice."

The following is one of the three notes given by the said John C. Baum, in pursuance of the provisions of that ordinance.

"\$29.28. Georgetown, 16th September, 1822. I assent to the provisions of the ordinance, entitled 'an ordinance providing for the settlement of all arrears of taxes due prior to the year 1820,' passed the 15th day of June, 1822, and six months after the date hereof, I promise to pay to the mayor, recorder, aldermen, and common council of the Corporation of Georgetown, or to their order, twenty-nine dollars and twenty-eight cents, with legal interest from this date, being one third of the amount of taxes due by me, for the years 1813, 1814, 1815, 1816, 1817, 1818, and 1819. John C. Baum."

By the 7th section of the Act of Congress of the 26th of May, 1824, [4 Stat. at Large, 75,] referred to in the case agreed, as marked D, entitled "An act supplementary to the act to incorporate the inhabitants of the city of Washington, passed the fifteenth of May, one thousand eight hundred and twenty, and for other purposes," it is enacted, "That public notice of the time and place of sale of any real property chargeable with taxes, in Georgetown or Alexandria, in all cases hereafter, shall be given once in each week," &c., "in which shall be stated the number of the lot or lots, or parts thereof intended to be sold, and the value of the assessment, and the amount of the taxes due and owing thereon."

Corporation of Georgetown v. Bank of the United States.

By the eighth section it is enacted, "That if, before the day of sale advertised as aforesaid, the owner," &c., "shall not pay the amount of taxes, with all costs thereon assessed, said lots or so many," &c., "shall be sold for cash," &c. "Provided, that no sale of real estate, but where the owner or tenant of the property has not sufficient personal estate out of which to enforce a collection of the debt due; and where he has personal property, it shall be lawful to collect said taxes, by distress and sale thereof."

And by the tenth section it is further enacted, "That where any taxes have fallen due and yet remain unpaid, or where any real estate has been sold by the Corporation of Georgetown or Alexandria, which sale, from any defect of proceeding in relation thereto, has been declared, or is considered, void, said corporation may proceed, and are hereby authorized to collect said taxes by sale of the real estate liable, agreeably to the provisions of this act in relation to other cases of collecting taxes hereafter to fall due.

"Provided, that where any person without notice of the outstanding taxes, has made a *bonâ fide* purchase from the legal owner of any real estate previous to the 15th day of May, 1824, said real estate, so acquired, shall not be liable for the taxes due and owing previous to said purchase."

Mr. Dunlop, for the plaintiffs, relied upon the opinion of CRANCH, C. J., in the case of the *Corporation of Georgetown v. Clement Smith*, [*ante*, 91,] to show that Baum, by his express assent to the ordinance of the 15th of June, 1822, and giving his notes under the provisions of that ordinance, had created an equitable lien upon the lots, which a court of equity might enforce, and that the bank purchased the property with knowledge of the lien, and therefore was bound in equity to pay the taxes for which those notes were given.

Besides which he contended that the corporation had a right, under the tenth section of the Act of May 26th, 1824, to sell the lots upon which taxes had then fallen due and yet remained unpaid, in the same manner as they might sell for taxes thereafter to become due. That the word "liable" in that section means no more than chargeable, or assessable. The corporation, by that section is "authorized to collect said taxes," (that is, the taxes already fallen due and then remaining unpaid,) "by sale of the real estate liable," that is, the real estate upon which the taxes had been assessed; so that if the corporation had not a previous right to sell the real estate for its taxes, it is given by this section.

But he contended that they had a previous right under their previous charters and amendments, to sell the real property for its taxes; and referred to the original charter of December 25th,

1789, c. § 7; Davis's Laws of Columbia, p. 480; Amended Charter by Act of Congress, March 3d, 1805, [2 Stat. at Large, 332,] Davis's Laws, 168, 172; 6 Bac. Ab., Tit. Statute B. pp. 369, 380; *Dugan v. Mayor of Baltimore*, 1 Gill & Johns. 500.

Mr. Lear, contra. The giving of the notes by J. C. Baum, created no lien on the lots unless they were bound before; for the ordinance says that the notes are to be secured by the property now bound for the payment of the taxes. It is not necessary that the personal property of the owner or tenant should be found on the lots, before it can be seized and sold for the taxes. It may be distrained wherever it may be found. The case stated does not say that there was not personal property of the owner or tenant at any time on the premises, sufficient to pay the taxes, but only that "there is no personal property of the said Baum wherewith to satisfy and pay the same." If there has been sufficient personal property of Baum or his tenant on the premises at any time since the taxes became payable, there can be no right to sell the real. No real property can be sold for taxes under the tenth section of the Act of the 26th of May, 1824, but such as was already "liable," that is, liable to be sold. That section does not make real property liable to be sold for taxes, which was not liable before. It only provides that it shall not be liable in the possession of a *bonâ fide* purchaser without notice, if purchased before the 15th of May, 1824; from which it is supposed that an inference may be drawn that, after that day, the property shall be liable whether the purchase was with or without notice; but the legislature only meant to authorize the sale of property already liable.

The first and regular mode of collecting the taxes is distress and sale of the personal property. The sale of the real is only the ultimate remedy. The corporation ought to have used due diligence to get the taxes out of the personal property. They had no power to make the real property liable to sale. It is not a necessary power, and cannot be assumed unless expressly given by their charter, or the authority of Congress. The amended charter of March 3d, 1809, only confirms the powers which they had previously enjoyed. A tax upon a slave, or a carriage, gives no lien on the carriage or slave; why should a tax on land create a lien on the land?

Mr. Dunlop in reply. The purchaser is bound to know what taxes were due upon the property when he purchased. The burden of proof is not on the corporation to show that there was not personal property on the real. It is sufficient if there was not personal property liable to seizure and sale at the time of the sale of the real. The corporation does not lose its remedy upon the real estate by the neglect of the collector to take the personal.

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The power to raise and collect taxes, given to the corporation by its original charter of 1789, implies all the powers necessary for that purpose; and gives, at least, all the powers which the State of Maryland then had in relation to that subject.

The statement admits that there was no personal property of the owner or tenant. The bank is in no better condition than Baum would be if the property were not transferred to the bank.

The practice, from 1802, has been to sell the real estate for its taxes.

The COURT (CRANCH, C. J., doubting, and THRUSTON, J., not giving an opinion as he had not heard the whole argument,) was of opinion, that the Corporation of Georgetown had, under the tenth section of the Act of the 26th of May, 1824, a right to sell land in Georgetown for corporation taxes due and unpaid at that date as well as for those subsequently becoming due.

DANIEL KURTZ v. HOLLINGSHEAD'S WIDOW AND HEIRS.

A deed executed by one of the grantors in Massachusetts, on the 1st of February, 1810, and by the other grantor on the 10th of August, 1810, in Georgetown, D. C., is to be considered as dated when the last grantor executed it, and if recorded within six months after that date, is recorded in due time. A widow is not barred by her acknowledgment of a deed not recorded.

In case of a sale under a creditor's bill, the heirs are entitled to the rents and profits from the death of their ancestor until the sale.

A creditor who seeks in equity, to set up a lost deed of trust, not recorded in due time, must come in *pari passu* with the other creditors.

BILL IN EQUITY to set up a lost deed of trust not recorded in due time.

The complainant was the trustee named in two deeds of trust made on the 17th of August, 1814, one by John Hollingshead and Adam King, and the other by John Hollingshead, to secure a debt of \$8,112.50 due by the latter to the Bank of Columbia. The widow of Hollingshead had duly relinquished her dower, by acknowledging the deeds, but they were mislaid until the time for recording them had expired.

The bank afterwards, to wit, on the 20th of June, 1815, filed the deeds in court with a petition that they might be recorded, but they were lost out of the clerk's office, before any order of the Court was made thereon.

The object of the present bill is to set up the lost deeds, and to obtain a decree for a sale of the property to pay the debt intended to be secured thereby; the sum now due being \$7,250.

Other creditors also filed their bill to subject the real estate of John Hollingshead to the payment of his debts, after exhausting

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the personal estate, and these cases came on to be heard together. A receiver had been appointed *pendente lite* to collect the rents and profits; and a sale was decreed and made.

Mr. Redin, for the widow and heirs of John Hollingshead, claimed, for the widow, her dower in her husband's interest in the real estate, and for the heirs their proportion of the rents accruing since the death of their ancestor, until the day of the sale; as was allowed by this Court in the case of *Colonel Wharton's heirs*, in June, 1825.

The widow admitted, in her answer, that she did relinquish her dower, but it was by a deed invalid by want of being recorded, recording being necessary to the extinguishment of her right of dower. The privy examination and acknowledgment of a deed by a *feme covert* cannot be proved by parol. *Elliot v. Peirsol*, 1 Peters, 328. The widow was no party to the deed; she never executed it. The mere acknowledgment of her relinquishment of her dower does not make her a party to the deed.

Mr. J. Dunlop, contra. The Bank of Columbia has an equitable preference by reason of the accident, (the loss of the deeds.) For although not recorded in time to give a legal preference, they give an equitable priority. *Pennel v. Farmers Bank of Maryland*, 7 Har. & Johns. 202.

The creditors are entitled to the rents during the *lis pendens*; at least since a receiver was appointed. All the rents now in litigation have been received *pendente lite*.

As to the dower; parol testimony may supply the defect of the record.

But her husband had no legal estate; the deed under which he held was not recorded within six months after its date, as required by the Maryland statute of 1766, c. 14. The deed was from Allen Dodge and Francis Dodge to George King, Adam King, and John Hollingshead, and was executed by Allen Dodge, in Massachusetts, on the 1st of February, 1810, which was the date inserted at the commencement of the deed, and was executed by Francis Dodge in Georgetown, D. C., on the 10th of August, which was the date inserted at the end of the deed, and the six months had expired as to the first of those dates, but not as to the second, when the deed was acknowledged.

Mr. Key, on the same side. If the deeds had been duly recorded, the law would have given the bank the preference. The bank has lost that legal priority by an accident. The deeds were lost after they were filed, whereby they became part of the records of this court. A court of equity will supply the loss of the record. *Hammond's Equity Digest*, 481; *Jesson v. Brewer*, Dickens, 370.

The rule that equitable assets shall be equally divided among

all the creditors, applies only to cases where the plaintiff applies to the general equitable jurisdiction of the Court; not to cases where a special power is given to a court of chancery. But in this case the application is to have the same remedy as if the deed had been recorded. The recording being prevented by accident, this Court will consider the deeds as recorded. If a judgment creditor is obliged to come into equity to enforce his lien, the land will not be equitable assets. If a bond-creditor, who has lost his bond, comes into equity to get his bond established, he will not lose the privilege which the dignity of his debt gives him.

Mr. Redin, in reply. The only question now is as to the distribution of the rents, which are not the proceeds of the sale. The Maryland statute of 1785, c. 72, §§ 4 and 5, only authorizes the payment of the debts out of the "proceeds of the sale," not out of the rents accruing before the sale. The bill only prays to be paid out of the proceeds of the sale. The rents accrued from 1822 to 1828.

The original bill was filed on the 20th of June, 1815, the amended bill in 1827. A receiver was appointed in 1824, by consent. The deeds, if they were deeds of trust, did not give any right to the rents and profits until sale. The grantor and his heirs were to receive them.

The question is not now whether Mr. Hollingshead had an estate of which his wife was entitled to dower; but whether she has relinquished it. The bill avers that he had an estate in fee-simple, and the fact is admitted in all the proceedings. She was not a party to the deed; and only parties are bound by the recording under the statute of 1785, c. 72. There is no equity against dower. The widow could make no contract but in the form required by law. There was no consideration which could bind her conscience.

These deeds were not a record. The filing them does not make them a record. It is only the loss of evidence, not the loss of a record.

The receiver was appointed by consent of the parties in three causes, namely, *King v. Hollingshead*; *Bank of Columbia* (or Kurtz for the use of the Bank of Columbia,) *v. Hollingshead and King*; and *Hollingshead* (Widow) *v. George King*. The appointment of a receiver does not affect the rights of the parties.

June 2, 1831. The COURT (*nem. con.*) was of opinion:

1. That the deed from A. & F. Dodge to George King, Adam King, and Jonathan Hollingshead, is to be considered as dated when it was executed by the last grantor, and, therefore, was recorded in due time.

2. That the widow was not barred of her dower by her acknowledgment, not recorded.

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3. That the heirs were entitled to the rents and profits, from the death of their ancestor to the day of sale.

4. That the Bank of Columbia is not entitled to priority of payment out of the proceeds of the sale.

CRANCH, C. J., delivered an opinion in writing, but it has been mislaid, and the court papers are not in place.

MEMORANDUM. June 22, 1831. The Court having finished all the business ready for hearing, and having ordered a special session for the trial of criminal causes, to be holden in the county of Washington, on the second Monday in October next, adjourned to that day.

CIRCUIT COURT OF THE UNITED STATES.

OCTOBER, 1831, AT WASHINGTON.

SPECIAL SESSION FOR THE TRIAL OF CRIMINAL CAUSES: AND ALSO BY
ADJOURNMENT OF MAY TERM, 1831.

HOLTZMAN v. PLUMSEL.

The conviction of an insolvent debtor, upon allegations filed upon a former petition, when he was committed in execution in favor of another creditor who has since been paid, is not a bar to his subsequent application for the benefit of the insolvent act, when committed under a subsequent execution.

THIS was a petition by Plumsell for the benefit of the insolvent act for the District of Columbia; to which, objections were filed by Holtzman, a creditor, before CRANCH, C. J., on the 6th of July last, and by him postponed, to take the opinion of this Court, whether a conviction upon allegations filed upon a former petition, when the petitioner was committed in execution in favor of another creditor who has since been paid, is a bar to his present application, when committed under a subsequent execution.

Upon consideration of the seventh section of the Act of March 3, 1803, [2 Stat. at Large, 237,] and the second section of the Act of June 24, 1812, [2 Stat. at Large, 755,] —

The COURT (MORSELL, J. absent,) was of opinion that it is not a bar.

Under the seventh section of the Act of March 3, 1803, the debtor convicted “of fraud or deceit towards his creditors, or of having lost by gaming as aforesaid, or of having given any preference as aforesaid,” “shall be precluded from any benefit under this act;” which words are explained, in the second section of the Act of 1812, by the words, “he shall not be permitted to take the said oath, and shall be precluded from any benefit under the said Act;” whereas, by the same sections of those acts, persons guilty of perjury in the proceedings under the said Act, “shall be forever precluded from any benefit under this Act.”

The word “forever,” seems to make a distinction in the extent of the penalty affixed to the two offences. In the first case, it seems to contemplate a denial of a discharge from that imprisonment only of which the petitioner complains; in the second, a perpetual bar in all cases, because no credit can be given to his oath after a conviction of perjury.

Ex parte Jones.

Ex parte J. A. JONES, Executor of Edward Jones.

An executor may be allowed credit for a loss upon the sale of stocks sold, although the sale was made without the order of the Orphans' Court.

APPEAL from the Orphans' Court for Washington county.

This cause originated in a petition by the executor of Edward Jones to the Orphans' Court, for leave to settle a second account, and to be allowed a credit for the loss upon certain stock sold for \$75.96 less than its appraised value.

The Judge of the Orphans' Court being of opinion that the executor was not entitled to an allowance for such loss, the stock having been sold without an order from that Court, refused to permit him to settle a second account and to allow him credit for the loss.

The petition was accompanied by an affidavit of the executor, verifying the account of sales by Thomas Biddle & Co., and averring that the sales were fair and *bonâ fide*, and at the full market price, and that he believes that no more could have been got for the stock; and by an affidavit of W. S. Nicholls, a respectable broker in this district, that the sales were at the then market price at Philadelphia, and that the Philadelphia market was as good a market for the sale of stock as any other in the United States; and that Thomas Biddle & Co., the brokers who sold the stock, are brokers of the highest repute for integrity and fairness in their dealing; and that, in his opinion, no better evidence of the true market price of stock could be given, than their bills.

It does not appear that there were any debts or claims against the testator outstanding and unpaid at the time of the sale, or any other cause which required an application to the judge for an order to sell. As between the executor and his vendee, the sale was valid without such an order; and it does not appear that any person interested has objected to the sale. If it was a fair and *bonâ fide* sale for the purpose of settling the estate, and if, in fact, the stock was sold for its full market value, although less than the appraised value, there has been an actual "decrease" of the estate when compared with the appraisement; or, in other words, a loss by decrease, which, under the express provision of the Testamentary Act of 1793, c. 8, § 2, is not to be sustained by the executor; and the same section provides that "he may be allowed for such decrease, on the settlement of his final or other account."

The law having expressly declared that the loss shall not be sustained by the executor, and that he may be allowed for it in his account, it seems to follow, that if such loss has happened, the judge ought to have allowed it, and to have opened the account

for that purpose, or permitted the executor to settle a second account, if the loss was ascertained after the settlement of the first account.

Then the only remaining question is, whether there was an actual decrease in the value of the stock when compared with the appraised value.

Upon this question the affidavit of Mr. Nicholls, which does not appear to have been objected to by the judge on the ground of informality, or incredibility, ought, in our opinion, to have been satisfactory.

It appears to us, that the judge erred in supposing that there could be, upon a sale, no loss, or no satisfactory evidence of loss, by decrease, unless the sale were made under an order of the Orphans' Court. The only effect of the want of such an order of sale, in a case like the present, we think, is to throw the burden of proof upon the executor, to satisfy the Court that the thing was sold for its full market value.

It is, therefore, ordered and decreed by this Court, on this 21st day of October, 1831, that the order of the Orphans' Court, in this cause, "that the said executor be not allowed to settle a second account, and credited for the said loss as prayed, and that the petition be dismissed with costs," be, and the same is hereby reversed.

And it is hereby further ordered and decreed, that the said petition be sustained; and that the said Orphans' Court permit the said executor to settle a second account, and allow him therein a credit for the sum of \$75.96 for the loss upon the sale of the stock in the petition mentioned.

And it is further ordered, that this decision and decree be certified under the seal of this Court, by the clerk thereof, and transmitted to the said Orphans' Court of Washington county.

UNITED STATES v. F. H. PETTIS.

In cases of felony, the prisoner is to be arraigned in the criminal bar, or dock.

INDICTMENT for perjury.

Baldwin and *Giberson*, for the defendant, requested that the prisoner might plead without being arraigned. But the Court ordered him to be arraigned, and he pleaded without going into the criminal bar, or dock.

The COURT, however, (*nem. con.*) said, that in the case of *The United States v. Pittman*, in Alexandria, at April Term, 1828, they had required that he should be arraigned at the bar, in the criminal dock, as in other cases of felony, and that in future they should adhere to the established rule and practice.

CIRCUIT COURT OF THE UNITED STATES.

DECEMBER TERM, 1831, AT WASHINGTON.*

EDWARD D. YOUNG *v.* PETER HOOVER.

If cattle be impounded for damage feasant, the badness of the plaintiff's fence is no justification of pound-breach, but may be given in evidence in mitigation of damages.

TRESPASS and pound-breach.

Mr. Marbury, for the defendant, offered evidence of the plaintiff's bad fence, in justification.

Mr. Redin, contra, contended that it was no justification of the pound-breach; and cited *Bradby on Distress*, 287; *Cotsworth v. Bettison*, 1 Salk. 247; *Lindon v. Hooper*, Cowp. 414; 1 Rol. Ab. 674, l. 5; Co. Lit. 47 *b*, and Latrobe's Justice, 135.

Mr. Marbury, in reply. If the distress be unlawful, the owner may take them out of pound if it be not locked, only latched, so as no violence be used. Com. Dig. Tit. Distress, D. 2, p. 500.

The COURT (*nem. con.*) said that the want of a sufficient fence was not a justification of breaking the pound; but may be given in evidence in mitigation of damages; the Court having before permitted the plaintiff to give evidence of the actual damage done by the cattle in the plaintiff's garden in aggravation of damages.

NEGRO MARY AND CHILD *v.* JANE TALBURT.

A slave, brought into the county of Washington, D. C., from Virginia, by her owner,

* There was no important point of law or practice decided at the November term, 1831.

United States v. Emerson.

afterwards ran away, and her owner sold her "running;" held, that she did not thereby lose the benefit of the provision of law in her favor.

A person coming to reside here may, under the 2d section of the Maryland statute of 1796, c. 67, lawfully bring his slaves with him; but if he sells them within three years after his removal, he loses the benefit of the exception in his favor, contained in the 2d section, and they are entitled to their freedom under the 1st section of the Act.

PETITION FOR FREEDOM.

Mr. R. S. Coxe, for the defendant, prayed the Court to instruct the jury, that if the petitioner was brought here from Virginia by her lawful owner, and afterward ran away, and her owner sold her running, supposing her to be then in Virginia; the running away in fraud of the law will prevent the slave from the benefit of the provision in her favor.

THRUSTON, J., stated the construction of the statute to be this:

By the 1st section of the Maryland Act of 1796, c. 67, a slave imported, for sale or to reside, is free.

The 2d section contains an exception in favor of those who come here to reside.

The 3d section is an exception to the 2d so as to prevent it from operating in favor of an owner so removing, who shall sell the slave within three years after his removal.

The COURT said that THRUSTON, J., stated the law correctly, as it had been decided lately in a case in Alexandria, in which *Mr. Taylor* was engaged. *Negro Harris v. Nelly Alexander*, at April term, 1830, [*ante*, 1.]

The Court refused to give the instruction prayed by *Mr. Coxe*. Verdict for the petitioner.

 UNITED STATES v. HIRAM S. EMERSON.

It is a contempt of Court, punishable under the Act of Congress of the 2d of March, 1831 "declaratory of the law concerning contempts of court," to call another a liar openly in the presence of the Court while in session, and in the hearing of the officers of the Court; and an assault and battery committed in the hall of entrance into the court-room, separated from it only by a door without panels and covered with cloth, was either "in the presence of the Court, or so near thereto as to obstruct the administration of justice."

THE defendant was yesterday brought before the Court by the marshal for contempt. He had been standing near the stove, in the court-room, in conversation with a man named Childs, concerning a suit which some negroes had brought for their freedom

Negro Samuel v. Childs.

against Emerson, when the latter said to him, in the hearing of the crier and bailiffs, "you are a liar;" to which Childs replied, "you are a damned liar." The crier commanded silence. Emerson shook his finger in Childs's face and said, "this place is your protection;" to which, Childs said, "this is not a place for altercation; I am willing to see you anywhere." They then went into the central hall of entrance, separated from the court-room only by a door without panels, but covered with cloth so as to afford but a slight obstruction to the sound. In the hall the conversation was repeated, and Emerson struck Childs several times with a whip. Some of the officers of the Court being present brought the parties immediately before the Court, who, upon hearing the testimony, ordered both parties to give security to appear in Court the next day to answer interrogatories touching the supposed contempt.

On this day the parties appeared and answered the interrogatories which had been filed by the Attorney of the United States; and the facts appearing thereby to be substantially the same as before stated,

The COURT (*nem. con.*) was of opinion that the language used by each to the other, in the presence of the Court, was a contempt; and that the attack made by Emerson upon Childs, in the hall of entrance, while the Court was sitting, was either "in the presence of the Court, or so near thereto as to obstruct the administration of justice," within the meaning of the Act of Congress of the 2d of March, 1831, (pamphlet, p. 99,) "declaratory of the law concerning contempts of court."

The Court therefore imposed a fine of five dollars upon each of the parties.

The grand jury having afterward found an indictment against Emerson for the assault and battery, and he having submitted to the Court, was fined five dollars upon that indictment.

 NEGRO SAMUEL v. CHILDS *et al.*

Two witnesses are necessary to a deed of manumission under the Maryland Act of 1796, c. 67, § 29.

If a female slave, manumitted by last will of the owner, to be free at the age of twenty-five years, has a child born after the death of the testator and before she arrives at the age of twenty-five, such child is a slave.

THE petitioner was included in a deed of manumission made in Maryland, February 17th, 1797, which was witnessed by only one witness. The Maryland Act of December 31, 1796, c. 67,

United States v. Glover.

§ 29, required two witnesses. The master afterwards carried them to Virginia, where he died, having by his will left them free at the age of twenty-five. The petitioner's mother, one of those slaves, was living in Virginia at the death of the testator; after whose death, and before the petitioner's mother had attained the age of twenty-five, that is, before she was actually free, the petitioner was born, in Virginia.

Mr. Key, for the defendant, contended that the petitioner, under those circumstances, was born a slave, and cited the case of *Maria and others v. Surbaugh*, 2 Rand. Rep. 228; in which the Court of Appeals of Virginia unanimously decided, that where a testator bequeathes a female slave on condition that she shall be free at a certain age, and before that period arrives she has issue, such issue are slaves; and

This COURT (THRUSTON, J., *contrà*,) decided accordingly. Judgment for the defendants.

UNITED STATES v. GLOVER.

A promissory oath cannot be the subject of an indictment for perjury.

INDICTMENT for perjury, upon the insolvent's oath that he would "deliver up, convey, and transfer all his property," &c., but he did not deliver up a promissory note which he had obtained after having made oath to his schedule, and before his oath made before the judge.

The COURT (MORSELL, J., absent,) at the request of *Mr. Wal-lach* and *Mr. Dandridge*, for the defendant, instructed the jury that a promissory oath could not be the subject of a prosecution for perjury.

MEMORANDUM. January 14th, 1832. On account of the session of the Supreme Court of the United States, this Court adjourned to the third Monday in March next.

United States v. Nicholls.

GUSTINE v. RINGGOLD.

The Court will not order a commission to issue under the Maryland law of 1773, c. 7, § 7, to take the deposition of a witness who resides out of the District of Columbia, but within one hundred miles of the place of trial, because this Court has jurisdiction to compel the attendance of the witness.

Mr. Marbury moved for a commission to take the deposition of a witness residing within one hundred miles of this place, but out of this district, and relies upon the Maryland law of 1773, c. 7, § 7, which authorizes the court to issue such a commission when there are material and competent witnesses "residing or living out of this province," and contended that a witness, residing out of this district, was residing out of this province, within the meaning and spirit of the act. That the Judiciary Act of Congress of 1789, does not authorize the sending of a subpoena beyond this district. That the marshal of Virginia has no right to serve an attachment from this Court; nor is he bound to serve a subpoena; and if he refuses, this Court cannot attach him.

The COURT (*THRUSTON, J. contra*.) refused to issue the commission, because it has jurisdiction to compel the attendance of a witness, if within one hundred miles; and, therefore, he does not reside out of this province, within the meaning of the act of Maryland, whose object was to obtain the testimony of a witness whose personal attendance could not be obtained. It may be difficult to compel the marshal of the district in which the witness may reside to do his duty; but this will not authorize the Court to dispense with the personal attendance of the witness, and admit his deposition to be taken in chief, and to be used absolutely upon the trial.

UNITED STATES, for the use of Anne L. Beale, v. WILLIAM S. NICHOLLS, Surety of J. H. Beale, Guardian of Anne L. Beale.

A guardian appointed by the Orphans' Court of the county of Washington, D. C., is liable, upon his bond given here, for money received by him in Maryland, for the use of his ward.

In an action upon a guardian's bond for not delivering up the property of the ward agreeably to an order of the Orphans' Court, it is not necessary to set forth in the breach all the grounds and reasons of that court for making the order; nor all the facts which would justify such an order.

THIS was an action of debt against the defendant as surety for John H. Beale, in his bond as guardian of Anne Lee Beale.

The declaration recited the bond with its condition, and assigned two breaches.

1. In not paying over to David Butler, Junior, who had been appointed guardian in his place, the sum of \$288.87 due by him to his ward upon the settlement of his guardianship account to a t time, the Orphans' Court having revoked his letters of guardianship and appointed the said Butler in his place.

2. In not delivering up and paying over to the said Butler \$150 received by the said Beale for rent of the said Anne L. Beale's share of the rent of land in Calvert county in Maryland, according to a like order of the said Orphans' Court.

At the trial of the cause, on the 24th of December, 1831, the defendant took a bill of exceptions, which stated that the plaintiffs, to support the issue on their part, offered in evidence to the jury an account of the said J. H. Beale, as guardian of the said Anne L. Beale, showing a balance of \$288.87 due by him to his ward, and one of the items charged to him was the sum of \$151.88 for "his ward's proportion of the interest on \$12,656.69 (being an undivided legacy from the late Dr. William Potts in the hands of his executor,) for one year."

Whereupon the defendant's counsel offered evidence to show that the said Dr. William Potts died in Frederick county, in the State of Maryland, and that Richard Potts of the said county and State, is the executor referred to in the said account; and also produced the will of the said Dr. William Potts.

And thereupon prayed the Court to instruct the jury that the defendant was not liable upon this bond on account of any moneys received by the said J. H. Beale, unless the same was received by him as guardian of his said ward on account of lands of the said ward lying in Washington county in this district, or from a personal estate of a deceased intestate or testator, of which estate administration hath been granted in the same county.

But the COURT, (CRANCH, C. J., absent,) refused to give the instruction, and the jury found a verdict for the plaintiffs, for the \$288.87, with interest.

Messrs. Key and Dunlop, for the defendant, then moved for a new trial and in arrest of judgment; and contended that the said J. H. Beale, the guardian, was not liable here for money received in Maryland. That he had no right to receive his ward's money in Maryland, and Dr. Potts's executor had no authority to pay it to him, and is still liable to her for the same. That he could only discharge himself by payment to a guardian appointed in Maryland.

That the first breach assigned is bad. It ought to have shown that the money was received on account of lands or estate in this county.

That the bond only covers what he had a right to receive; and

Chesapeake and Ohio Canal Company v. Bradley & Carroll.

that he had no right to receive money out of this district. That the breach assigned ought to show the authority of the Orphans' Court to remove Beale from the guardianship, and to appoint Butler in his place. The only case in which the Orphans' Court can remove a guardian, is where he refuses to give new security when required by the court.

Neither breach shows any such refusal, or any other ground for his removal. That court is of limited and special jurisdiction, and all the circumstances which will justify the removal ought to appear upon the face of the proceedings.

Mr. Hellen, in reply, was stopped by the Court, who said they would hear him if they should think it necessary.

The COURT (MORSELL, J., *contra*,) overruled both motions.

MORSELL, J., thought the breach bad in not averring that Beale had refused to give new security.



CHESAPEAKE AND OHIO CANAL COMPANY v. W. A. BRADLEY and
WILLIAM THOMAS CARROLL.

A notice cannot lawfully be served on Sunday.

THIS was a motion for judgment for an instalment on a joint subscription by the defendants, in the handwriting of Mr. Bradley, for one hundred shares. The ten days' notice, required by the fifth section of the charter, was served on Mr. Carroll on Sunday. Upon that ground the motion was overruled by the Court, although the parties had appeared according to the notice. *Monkhouse v. Roberts*, 8 East, 547; *Rex v. Croke*, Cowp. 26.

Mr. Wallach and *Mr. Jones*, for plaintiffs.

Mr. Tabbs and *Mr. Cox*, for defendants.

CIRCUIT COURT OF THE UNITED STATES.

APRIL TERM, 1832, AT ALEXANDRIA.

JOHN Y. NICHOLSON *v.* JAMES MCGUIRE.

A trustee who is directed by the deed of trust to sell the property and invest the proceeds in productive funds, and fails to do it, is liable to pay interest.

A receipt given by a young man just arrived at full age, for a certain sum, as his share of his father's estate, is not a bar in equity to his demanding the interest and dividends upon the fund to which he was entitled by the terms of the deed of trust.

BILL IN EQUITY, claiming interest on the plaintiff's share of his father's estate in the hands of the defendant under a deed of trust, by which the defendant was directed to invest the estate in productive stocks; the plaintiff having, at full age, given a receipt for \$1,048.74, as his share of the estate.

Mr. Hewitt, for the plaintiff.

Mr. Taylor, for the defendant.

CRANCH, C. J., delivered the opinion of the COURT. (THRUSTON, J., absent.)

The bill in this cause states, that the plaintiff's father, in November, 1821, died, having first made a deed of trust of his whole estate to the defendant, and that among other trusts the defendant was bound to pay to the plaintiff, upon his coming of age, \$1,500, and such portion of the interest of the same as should be expended in his support and education; and that it was made the duty of the defendant, at the death of the plaintiff's father, to sell all the property in the deed mentioned, and invest the proceeds in such stock as the defendant should deem best for the interest of the children. The deed provides that \$3,000 should be paid to his daughter Mary at the death of her father; \$2,500 to his son, Henry W. Nicholson, at twenty-one years of age; \$1,500 to the plaintiff, as before-mentioned; and \$2,350 to his son Lionel, at twenty-one; to whom also the deed gives the residue of the proceeds of the property.

The bill charges that the plaintiff was entitled to receive interest upon the \$1,500 from the death of his father until he became of age. That when he arrived at the age of twenty-one the

defendant paid him \$1,048.74; falsely and fraudulently representing to the plaintiff that that was all he was entitled to receive. That the plaintiff, under these impressions, created by the defendant, gave him a receipt, which, he supposes, purported to be a receipt in full for the provision made for him by his father; but that he never did receive more than the \$1,500.

The bill then prays that the defendant may be decreed to pay him interest on the \$1,500 from the death of his father till he obtained his majority, which was in the month of ———, 1829; and for general relief.

The defendant, in his answer, admits the trust as set forth in the deed; that Henry became of age on the 17th of August, 1826, and the plaintiff on the 18th of June, 1829. That Lionel will become of age on the 18th of November, 1832. That the defendant has not sold the stocks mentioned in the deed, but sold other personal property to the amount of \$3,622.46 on the 15th of December, 1821; and he exhibits his account with the trust fund, and with each of the distributees.

That he paid over to the executors \$1,233.79, to be applied by them to the payment of the debts of the plaintiff's father. That he considered the power of sale as discretionary with himself, and that he acted according to his best judgment. That he never has applied any of the trust fund to his own use. That he believed the stocks of the banks in this district to be precarious; and states other reasons for not investing the trust-fund in stock of the United States, or in stock of the Bank of the United States, or in private securities.

That the widow of the plaintiff's father instituted a suit in chancery in this Court to vacate the deed to the extent of her supposed distributory share, or one third part of the property conveyed, on the ground that the deed was made by her husband in his last illness, in contemplation of his death and for the avowed purpose of excluding her.

The account rendered by the defendant shows that without sale of the specific stocks mentioned in the deed, the defendant had always in his hands, funds sufficient to make the payments to the distributees; and sufficient to produce the interest upon the principal sums until they became payable.

It is clear that, by the deed of trust, the plaintiff had a right to receive the dividends and interest upon his distributive share until it should be paid; and that it was the duty of the defendant to invest the fund in such stocks as would have produced such dividends and interest; and, having failed to do so, he was bound to pay the interest himself; even if, as he is said to have alleged, the money had been lying idle in the bank.

But it was competent for the plaintiff when he came of age to relinquish his claim for interest; and if he has done so in the present case, with a full knowledge of all the circumstances, he must be bound by his act.

Upon receiving \$1,048.74, on the 24th of August, 1829, he gave the following receipt:

"Received, Alexandria, 24th day of August, 1829, the sum of one thousand and forty-eight dollars $\frac{74}{100}$, which, with the moneys advanced to me during my minority, is in full of fifteen hundred dollars provided for me in the trust-deed from my father to James McGuire. John Y. Nicholson.

"\$1,048.74. Witness: A. Moore."

This is not a receipt in full of all demands under the deed, but only of the \$1,500 provided for him by the deed. But the deed provided more than the \$1,500. It provided for the dividends and interest which should accrue upon \$1,500, laid out in productive stocks. It bound the defendant to procure such stocks at all events; and the plaintiff's right to those dividends was as perfect as his right to the principal sum. When, therefore, he gave a receipt for the principal sum, it was no bar to a claim for the dividends which had accrued upon it. The \$1,500, constituted a specific sum set apart for a particular purpose. It was not a debt due from the defendant for the withholding of which interest was to be given by way of damages. The dividends were as expressly given as the principal.

No inference can be drawn, from such a receipt as this, that the plaintiff intended to acquit the defendant of the dividends, or interest, if he had a right to claim them under the deed. It is not, therefore, a bar in equity to the present claim. But if it had been a receipt in full of all demands, yet it appears to have been obtained under circumstances which should induce a court of equity to say, that the defendant ought not, in good conscience, to avail himself of it in bar of the present suit. The defendant was a young man just arrived at the age of twenty-one, eager to receive the provision made for him by the deed of trust, and probably ignorant of the law, and of his rights under the deed. It can hardly be supposed that he was aware that if the defendant had not laid out the fund in productive stock, agreeably to the directions of the deed, he was liable to pay interest on it to those among whom the fund was to be distributed at a future day.

There is also evidence that the defendant alleged that the trust-fund was lying dead in the Bank of Alexandria, and not used by him until drawn out for the purposes of the trust. This also tended to mislead the plaintiff. There is evidence also that from the year 1821 to 1828, the defendant was extensively engaged

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in the buying and selling lumber. That he received in the first year, under the deed of trust upwards of \$8,000, and paid on account of the trust, not more than \$1,500; yet it does not appear that he had in the bank at any one time more than \$4,750.46; and in December, 1823, although he had received by his own account \$10,281.80, on account of the trust-fund, and had paid on that account, not more than \$5,000, his deposits in bank amounted only to \$745.70.

The excuse, therefore, which he alleged, for not paying interest, (namely, that the money was lying dead in the bank,) is not supported by the evidence; and a receipt in full, if obtained upon such a representation, ought not in good conscience to avail the defendant to any greater extent than to the amount actually received.

The plaintiff, in his bill, distinctly charges that the receipt was obtained under impressions, created by the defendant's falsely and fraudulently representing to the plaintiff, that the sum of \$1,048.74 was all that he was entitled to receive. This allegation is not denied by the defendant's answer, and is corroborated by the testimony of Mr. Moore and Mr. White; the latter of whom proves that the defendant was advised by able counsel, as early as December, 1823, that if he did not invest the fund in productive stock, he would be liable to pay interest; and the former testifies that the defendant informed those who were to receive the fund, that it was lying dead in the bank.

Under such circumstances the Court cannot say that the receipt is a bar to the plaintiff's claim for interest.

If the receipt is not a bar, we think that the plaintiff has a right to claim it, inasmuch as the defendant had sufficient funds in his hands, and did not invest them as required by the terms of the deed of trust.

We think the plaintiff is entitled to interest, at six per cent. per annum, on \$1,500, from the expiration of a reasonable time, say six months after the death of his father, until the 24th of August, 1829, when the principal sum was paid; the amount of which can be ascertained without a reference to a master.

Ex parte E. J. LEE, Clerk, &c.

If a case in equity be set for hearing as to some of the defendants, and, as to them, brought upon the docket of the Court, and continued at the rules as to other defendants who are absent and who have not answered, the clerk has a right to charge his fees for the continuances at the rules.

Mr. Hewitt objected to the clerk's bill of fees in a chancery

Ex parte Lee.

attachment, in which he charged continuances at the rules, after the cause was set for hearing as to the resident defendants, and common order of publication as to the absent defendants, and before the order of publication was executed. The cause as to the resident defendants was transferred to the court-docket; but as to the absent defendants it remained at the rules.

The COURT said it was a question of practice; and requested information as to the practice in the courts of Virginia. *Mr. R. J. Taylor* said the practice was as stated by *Mr. Lee*. Precedents were also produced in the time of Colonel Deneale; and on this day, (3d May, 1832,) a letter from Mr. Phillips, the clerk of the Court at Fauquier, in Virginia, was produced, confirming *Mr. Lee's* statement of the practice.

The COURT (*THRUSTON, J.*, absent,) decided the point in favor of the clerk.

CIRCUIT COURT OF THE UNITED STATES.

MAY TERM, 1832, AT WASHINGTON.

HARRISON & STERRET v. DANIEL BOYD.

Quære, whether a non-resident creditor is bound by the discharge of his debtor under the insolvent law of the District of Columbia, who had been arrested at his suit, but who, at the time of the discharge, was out upon a bail-bond to the marshal?

THE defendant having been discharged this morning under the insolvent act of the District of Columbia, *Mr. R. S. Coxe*, offered to appear for him without special bail.

Mr. C. Cox, for the plaintiffs, said that they were non-resident creditors, and not bound by the defendant's discharge, inasmuch as he was not confined at their instance, at the time of his discharge. By the Act of Congress of the 6th of May, 1822, [3 Stat. at Large, 682,] it is "provided that no discharge under this act, or the act to which it is amendatory, shall operate against any creditor residing without the limits of the District of Columbia, except the creditor at whose instance the debtor may be confined." Davis's Laws, D. C. p. 362.

The defendant had been arrested on a *capias ad respondendum*, at the suit of these plaintiffs, but had been discharged by the marshal from that arrest by giving an appearance bail-bond to the marshal, before his discharge under the insolvent act, so that at the time of his discharge he was not literally confined at the instance of these plaintiffs.

Mr. R. S. Coxe, *contra*, cited *Clay v. Smith*, 3 Peters, 411, and contended that a non-resident creditor, by making use of our court to compel payment had made himself a resident creditor *quoad hoc*; and the defendant having given bail, (it was only an appearance bond,) was thereby in confinement at the instance of these plaintiffs.

He cited also the case of *Ogden v. Saunders*, 12 Wheat. 362, 363, 364, and *Shaw v. Robbins*, cited in a note to *Ogden v. Saunders*, in p. 369.

But the COURT (THRUSTON, J., absent,) being divided in opinion, the motion to appear without bail did not succeed.

CRANCH, C. J., was of opinion that the plaintiffs, by bringing suit here, had not ceased to be "residing without the limits of the District of Columbia," within the meaning of the Act of Congress; nor could the defendant be considered as confined at the instance of these plaintiffs after he had given an appearance bail-bond whereby he was released from the custody of the marshal. His sureties in that bond had none of the rights and power of special bail, who receive the body of the debtor into their custody and keeping, and may even confine him if necessary.

MORSELL, J., thought that by bringing suit here, the plaintiffs were, for this purpose, to be considered as not residing out of the limits of the District of Columbia.

Mr. C. Cox, for the plaintiffs, also cited the case of *Harrison v. Gales*, special bail of Gilbert C. Russell, in this Court at December term, 1828, (3 Cranch, C. C. 376,) and *Farrow v. Brown*, special bail of Russell, at the same term; where the plaintiff was a resident of Virginia at the time of Russell's discharge under the insolvent act of this district, and had then a suit against Russell, pending in this Court, for his debt; in which case a majority of this Court, namely, CRANCH, C. J., and THRUSTON, J., refused to relieve the bail on the ground of Russell's discharge under the act.

COOK v. FENTON.

The Act of Congress of May 6, 1822, entitled "An Act for the Relief of certain Insolvent Debtors," is not confined to non-resident debtors.

JUDGMENT was rendered in this case against Fenton at the last term.

Mr. Redin, for the bail, now moved to exonerate the bail of Fenton, on the ground of his discharge under the insolvent act of this district, in January, 1832.

Mr. Wallach, contra. The plaintiff was a non-resident creditor of Fenton at the time of his discharge, and the debtor was not then confined at his instance.

Mr. Redin contended that the Act of Congress of the 6th of May, 1822, (Davis's Laws, D. C. p. 362,) applied only to non-resident debtors, [3 Stat. at Large, 682.]

But the COURT said that that point had been many times discussed, and overruled by the Court. The words were peremptory, "that no discharge under this act, or the act to which it is amendatory, shall operate," &c., thereby referring to every discharge which should thereafter be granted under the original Act of 3d of March, 1803, [2 Stat. at Large, 237.]

McDANIEL'S Lessee v. WAILES, Tenant of Dyer.

In ejectment, the fictitious lease may be amended, after the jury is sworn, upon payment of the costs of the term.

THE fictitious lease to the plaintiff was, by mistake, dated before the expiration of the lease to the defendant.

After the jury was sworn, the plaintiff prayed leave to correct the declaration in that respect, which

The COURT (*nem con.*) permitted to be done on payment of the costs of the term. A juror was withdrawn, the amendment was made, and the jury sworn again.

TENCH RINGGOLD v. JEREMIAH HOFFMAN.

The person, to whose use the suit is entered of record, although liable to the defendant for his costs, is not thereby liable to the marshal for his poundage upon a *ca. sa.*

ASSUMPSIT, by the plaintiff, late marshal of the District of Columbia, (for \$187.73 for his poundage fees,) against Jeremiah Hoffman, survivor of William Hoffman, for whose use a judgment had been recovered in the names of George and John Hoffman, against John Cox, who was arrested by the marshal (Ringgold) upon a *ca. sa.*, and released upon a prison-bonds bond, and afterwards discharged under the insolvent act of the District of Columbia.

The suit against Cox was originally brought in the names of George and John Hoffman for the use of William and Jeremiah Hoffman, and so entered upon the record, and Mr. Barrell, their attorney, became security for the officers' fees, at the time of issuing the writ of *capias ad respondendum*. William Hoffman died before the commencement of the present suit.

Mr. R. S. Cox, for the defendant, contended, at the trial, that the person for whose use the suit was brought, is not liable to the officers for their fees, although made liable to the defendant for his costs, by the Maryland law of 1796, c. 43, § 13.

Security for officers' fees is to be given under the Maryland law of 1715, c. 48, § 12; and in this case was given by Mr. Barrell as above-mentioned.

Mr. Lear, for the plaintiff, *contrà*, contended that the service having been performed by the plaintiff at the request of the defendant, he is liable to the plaintiff, upon common-law principles, in assumpsit. The service, upon request, is a good consideration for the assumpsit.

Ringgold v. Hoffman.

Upon the trial the plaintiff took a bill of exceptions, which stated that the plaintiff offered in evidence to the jury a certain record of a *ca. sa.*, (the production of the judgment having been dispensed with by consent,) issued by this Court in the case of *George and John Hoffman*, use of William and Jeremiah Hoffman, *v. John Cox*, who was thereupon arrested by the plaintiff, and committed by him, and forthwith liberated upon a prison-bonds bond, and the said *ca. sa.* was so returned; and that the said John Cox was duly discharged under the insolvent laws of the District of Columbia; and that evidence was given that the plaintiffs in the said action against the said John Cox, had given good security for the officers' fees in that suit; that the attorney of the plaintiffs in that action brought it in the name of George and John Hoffman, for the use of William and Jeremiah Hoffman, believing from the indorsement on the note that it was their property. The plaintiff also produced the said note taken from the files of the original suit in this Court.

Whereupon the defendant, by his counsel, prayed the Court to instruct the jury "that the foregoing evidence was not competent and sufficient to entitle the plaintiff, in this action, to recover."

But the Court allowed the said evidence to go to the jury as competent evidence in this suit.

The plaintiff then offered to prove by a competent witness, that the said William and Jeremiah Hoffman were merchants transacting business together in London, and reputed by common report to be partners, at the time the suit was brought for their use against the said John Cox; that William died before the present suit was brought, and one or both the said partners were in Baltimore between the years 1823 and 1828, occasionally; and that William was in Washington, D. C., and Alexandria, in 1822.

Whereupon *Mr. Lear*, for the plaintiff, prayed the court to instruct the jury, that if they believe from the evidence that the suit of *George and John Hoffman v. John Cox*, upon which the *ca. sa.* was issued, was brought for the use and benefit, and at the request of the defendant in this suit, and of his partner William Hoffman, or either of them, and that they were to receive the avails of it, if any; that the *ca. sa.* was ordered by their attorney, and served at his request, and that the said William died before the commencement of this suit, the plaintiff is entitled to recover from the defendant the fees charged in his account, which instruction the Court refused to give; and charged the jury that the evidence aforesaid was not sufficient to entitle the plaintiff to recover in this action; to which refusal and instruction the plaintiff, by his counsel, excepted, 24th of May, 1832.

MORSELL, J. dissented.

United States v. Fitzgerald.

CRANCH, C. J., was of opinion, that the persons for whose use the suit was entered were not liable to the officers for their fees, although liable to the defendant for costs.

THRUSTON, J., was of opinion that there was no evidence that the *ca. sa.* was served at the request of the defendant; and he and MORSELL, J., seemed to be of opinion, that if that fact had been proved, the plaintiff might have recovered.

UNITED STATES v. EDWARD FITZGERALD.

The duties of a purser in the navy, stationed at a navy-yard, are not defined by law, and are to be ascertained by the jury.

It is competent for the Court to admit evidence of equitable claims by the defendant against the United States, which have been rejected by the accounting officers of the Treasury.

A purser who disburses money for the United States, which it is not his duty, as purser, to disburse, is, in equity, entitled to a reasonable compensation therefor.

The pursers are bound by the regulations made by the Commissioners of the Navy in 1817, with the consent of the Secretary of the Navy, and approved by the President of the United States, and are thereby bound to make the disbursements required, without other compensation than their regular pay as purser, unless when the disbursements were made there was an agreement or understanding between them and the Secretary of the Navy, or other officer competent to make such an agreement, that they should receive compensation therefor, other than their regular and fixed pay as purser.

THIS was a suit, docketed by consent, to recover from the defendant a balance of \$5,035.68, stated by the accounting officers of the Treasury Department to be due from him, as a purser in the navy, to the United States.

That balance accrued by the rejection of the following items of debit claimed by him, viz.:

Clerk hire for the year 1828,	\$600.00
“ for 1st quarter 1829,	150.00
Travelling expenses to Washington in 1828,	68.70
“ “ in 1829,	68.70
Commission for paying mechanics in dry dock in 1828, at one per cent.,	447.41
Commission for paying mechanics in dry dock 1st quarter in 1829,	174.16
Commission for paying mechanics in dry dock to 30th September, 1830,	1,279.51
Clerk hire from May, 1826, to 30th September, 1830,	1,325.00
Commission for paying mechanics in navy-yard,	900.00
Overcharge for travelling expenses in 1831,	22.20

\$5,035.68

Mr. Swann, District Attorney for the United States, after the evidence was closed, prayed the Court to instruct the jury that there was no law which authorized the defendant to make these charges against the United States.

Mr. R. S. Coxe, contra. These are equitable claims against the United States, which he has a right to set off, according to the case of the *United States v. Wilkins*, 6 Wheat. 143.

The duty of paying laborers, &c., was assigned to him in 1817, and until 1829 he was allowed by the department a commission of one per cent.

Mr Coxe then prayed the Court to instruct the jury, in substance, that if they should be satisfied by the evidence that the disbursement of this money was not a part of his duty as purser, and he was requested by the United States to disburse it, he is entitled to so much money for that service as he deserved to have therefor.

The COURT (THRUSTON, J., *contra*,) refused *Mr. Swann's* prayer, because it was not predicated upon any fact to be found by the jury; and because the Court could not, as a matter of law, say what the duties of a purser were, or whether this disbursement was part of the defendant's duty as purser, independent of all facts to be found by a jury; as there is no statute defining the duties of a purser stationed at a navy yard.

The COURT, (THRUSTON, J., *contra*,) gave the instruction prayed by *Mr. Coxe*.

Mr. Swann, having given in evidence the rules and regulations made by the Commissioners of the Navy, with the consent of the Secretary of the Navy, and approved by the President of the United States in 1817, prayed the Court to instruct the jury that they were binding upon the defendant as a purser, and that he was thereby bound to make the disbursement without any commission or other compensation than his regular pay as purser; which the Court (THRUSTON, J., *contra*,) refused, unless accompanied by the following qualification, namely, "unless the jury should be satisfied by the evidence, that when the disbursements were made, there was an agreement or understanding between the defendant and the Secretary of the Navy, or other officer competent to make such agreement, that he should receive a commission or other compensation for such disbursements beyond his fixed and regular pay as purser."

With that qualification, the COURT gave the last instruction prayed by *Mr. Swann*.

Verdict for the defendant. *Mr. Swann* took a bill of exceptions, which is not now with the papers of the case.

No writ of error has been issued.

JAMES CORCORAN v. WILLIAM DOUGHERTY.

It is competent for the defendant in an action upon a special contract in writing not under seal, to prove a parol condition not stated in the written contract. If there are mutual promises, not dependent on each other, the omission to state in the declaration, performance of that made by the plaintiff, is cured by the verdict.

ASSUMPSIT upon the following special agreement in writing :

"Georgetown, May 14th, 1830. I hereby agree to purchase of James Corcoran a part of his stock of dry goods; namely, all cotton, silks, and other goods, the cloths, cassimeres, flannels, baizes, and blankets excepted, at a discount of thirty-five per cent. from the original cost, and in payment of the same agree to substitute my paper in the Union Bank in lieu of his with such security as will be satisfactory to the said bank for the amount of such stock purchased. Wm. Dougherty."

Mr. Key and *Mr. R. S. Coxe*, for the defendant, offered to prove by the testimony of witnesses, that, at the time the defendant signed the written contract and delivered it to the plaintiff, the defendant said, "This purchase, you are to understand is made, and I am to comply with this agreement only in case of your getting the store for me," and that the plaintiff took the paper, saying, "Yes, I am to get you the store, otherwise not to hold you to the purchase;" and cited 4 Starkie, 1003, and *Farewell v. Coker*, 2 Merrivale, 353.

Mr. Swann and *Mr. Marbury*, for the plaintiff, cited 4 Starkie, 1009, and Id. 1048, 1049, and note g, in p. 1049.

The COURT (*nem. con.*) permitted the evidence thus offered by the plaintiff's counsel, to be given to the jury. Verdict for the plaintiff, \$405.71.

Mr. Coxe and *Mr. Key*, for the defendant, moved for a new trial, 1. Because the verdict is against evidence. 2. Because it is a verdict without evidence.

They also moved in arrest of judgment,

1. Because the declaration is insufficient.
2. Because the two last counts are insufficient.
3. Because the verdict is general, and one of the counts is insufficient.

They objected to the third count because it does not aver that the plaintiff had guarantied to the defendant the occupation of the store. *Worsley v. Wood*, 6 T. R. 719; 1 Chitty, 313.

Mr. Marbury, *contra*, contended, that the promise of the plaintiff respecting the store, was an independent agreement subsequently to be performed; but if it is not, the want of the averment of it in the declaration is cured by the verdict. Upon the

 Lloyd v. Scott.

first point he cited *Bennett v. Pixley*, 7 Johns. 250; *Campbell v. Jones*, 6 T. R. 570; *Humble v. Bland*, Id. 257; *Walker v. Harris*, 1 Anstr. 245; *Jones v. Barkley*, Doug. 690; and *Turner v. Goodwin*, 10 Mod. 190.

And upon the second point, namely, that the omission was cured by the verdict. *Collins v. Gibbs*, 2 Burr. 900; *Sellon*, Pr. 499; 1 Chitty on Pl. 319; *Worsley v. Wood*, 6 T. R. 715; 2 Saund. 228, note *b*; *Rawson v. Johnson*, 1 East, 203, 209.

The COURT overruled both motions; being of opinion that the verdict was not against nor without evidence; and that the declaration was cured by the verdict. CRANCH, C. J., doubting as to this point.

JOHN LLOYD v. CHARLES SCOTT, Bailiff of W. S. Moore.

A rent-charge or annuity of \$500 a year in consideration of \$5,000 advanced and paid therefor, is not usurious on the face of the grant, although it contain the following covenants, namely, that the grantor will pay the said rent as it shall become due; and if not punctually paid, that the grantee may enter and distrain therefor; and that if the rent shall remain thirty days unpaid, and no sufficient distress found on the premises charged, the grantee may enter and from thence remove and expel the grantor, his heirs and assigns, and hold and enjoy the same as his absolute estate forever thereafter; that the grantor will keep the buildings insured against fire, and will execute and deliver any further conveyance necessary more completely to charge the premises with the said annuity and to carry into effect the intention of the parties. And a covenant on the part of the grantee, that if the grantor at any time after the expiration of five years, should pay to the grantee \$5,000 and all arrears of rent, the grantee would execute and deliver, to the grantor, any deed or instrument necessary for releasing and extinguishing the said rent or annuity; which, on such payment, shall thereafter forever cease to be payable.

Nor is it a good plea in bar of an avowry of distress for rent due by such a grant, that the deed was made in pursuance of an agreement that the grantee should "advance" to the grantor \$5,000, in consideration of which the grantor should, by such a deed grant to the grantee an annuity or rent of \$500 with the covenants aforesaid; although the plea aver that "so" the said deed was made "in consideration of money advanced upon and for usury;" "and there has been reserved and taken above the rate of six dollars in the hundred for the forbearance of the said sum of \$5000 for the term of one year.

Nor is it a good plea in bar to such an avowry to say that the deed was made in pursuance of an agreement that the grantee should "lend" \$5,000 to the grantor upon the terms and with the covenants contained in the said deed; although the plea aver that "so" the grantor saith the said deed was made "in consideration of money lent upon and for usury;" and that "by the said indenture there has been reserved and taken above the rate of six dollars in the hundred for the forbearance of the said sum of \$5,000 so lent as aforesaid for the term of one year"

Nor is it a good plea in bar of such an avowry, to say that the said deed was made in pursuance of an agreement that the grantee should "advance" to the grantor \$5,000 upon the terms and conditions, and in consideration of the covenants in the said indenture mentioned and contained, "and so the said John saith that the said deed of indenture was made in consideration of money advanced upon and for usury, and that by the said indenture there has been reserved and taken above the rate of six dollars in the hundred for the forbearance of the said sum of \$5,000 so advanced as aforesaid for the term of one year."

Nor is it a good plea, in bar of such avowry, to say, that the said deed was made in pursuance of an agreement that the grantee should "lend" the grantor \$5,000 "upon

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the terms and conditions and in consideration of the covenants and agreements in the said indenture mentioned and contained, and that he did so lend," &c.; "and so the said John saith that the said deed of indenture was made in consideration of money lent upon and for usury, and that by the said indenture there has been reserved and taken above the rate of six dollars in the hundred for the forbearance of the said sum of \$5,000 so lent as aforesaid for the term of one year."

There is no rule of law or practice which forbids the Court to grant a new trial where the verdict is against the weight of the evidence.

A motion for a new trial is an application to the sound legal discretion of the Court.

The contract prohibited by the Statute of Usury in Virginia, is a contract to receive something for forbearance; that is, for forbearing to enforce some debt or right; and unless there was a right to demand payment, there could be no forbearance; and if no forbearance, no usury.

REPLEVIN. The defendant, Scott, makes cognizance as bailiff of W. S. Moore, and justifies the taking as a distress for \$250 rent due under the following grant of an annuity or rent, namely:

"This indenture, made this eleventh day of June, in the year one thousand eight hundred and fourteen, between Jonathan Scholfield and Eleanor his wife, of the town of Alexandria, and District of Columbia, of the one part, and William S. Moore of the same town, of the other part, witnesses, That the said Jonathan Scholfield and Eleanor his wife, in consideration of the sum of five thousand dollars to the said Jonathan Scholfield by the said William S. Moore in hand paid, of which the receipt is hereby acknowledged, have granted, bargained, and sold, and by these presents do grant, bargain, and sell, to the said William S. Moore, his heirs and assigns forever, one certain annuity or rent of five hundred dollars, to be issuing out of and charged upon a lot of ground and four brick tenements and appurtenances thereon erected, on the east side of Washington street, and the north of Duke street, in the said town of Alexandria, beginning, &c. &c., to be paid to the said William S. Moore, his heirs and assigns by equal half-yearly payments — \$250 on the 10th day of December and on the 10th day of June forever hereafter: To hold the said annuity or rent to the said William S. Moore, his heirs and assigns, to his and their only proper use forever; and the said Jonathan Scholfield for himself, his heirs, executors, administrators, and assigns, does hereby covenant with the said William S. Moore, his heirs and assigns as follows, that is to say, that he the said Jonathan Scholfield, his heirs and assigns, will well and truly pay to the said William S. Moore, his heirs and assigns, the said annuity or rent of \$500, by equal half-yearly payments on the 10th day of June and on the 10th day of December, in each year forever hereafter, as the same shall become due; and that if the same be not punctually paid, then it shall be lawful for the said William S. Moore, his heirs and assigns, from time to time, on every such default, to enter on the premises charged, and to levy, by distress and sale of the goods and chattels there found, the

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rent in arrear and the costs of distress and sale ; and if the same shall remain in arrear and unpaid for the space of thirty days after any day of payment as aforesaid, and no distress, sufficient to satisfy the same, can be found on the premises charged, then it shall be lawful for the said William S. Moore, his heirs and assigns, to enter on the premises charged, and from thence to remove and expel the said Jonathan Scholfield, his heirs and assigns, and to hold and enjoy the same as his and their absolute estate forever thereafter ; and further, that the said Jonathan Scholfield is now, in his own right, seized in fee-simple in the premises charged as aforesaid, free from any condition or incumbrance, other than such as are specified and provided for in a deed from the said Jonathan Scholfield to Robert J. Taylor, dated the day before the date hereof ; and that the said Jonathan Scholfield, his heirs and assigns, will forever hereafter keep the buildings and improvements which now or hereafter may be erected on the premises charged, fully insured against fire, in some incorporated insurance office, and will assign the policies of insurance to such trustees as the said William S. Moore, his heirs or assigns, may appoint ; to the intent, that if any damage or destruction from fire shall happen, the money received on such policies may be applied to rebuilding or repairing the buildings destroyed or damaged.

“ And that he, the said Jonathan Scholfield, his heirs and assigns, will execute and deliver any further conveyance which may be necessary more completely to charge the premises, before described, with the annuity aforesaid, to carry into full effect the intention of the parties hereto ; and lastly, that he and his heirs will forever warrant and defend the annuity or rent hereby granted to the said William S. Moore, his heirs and assigns, against any defalcation or deduction for or on account of any act of him, his heirs or assigns.

“ And the said William S. Moore, for himself, and his heirs and assigns, does hereby covenant with the said Jonathan Scholfield, his heirs and assigns, that if the said Jonathan Scholfield, his heirs or assigns, shall, at any time after the expiration of five years from the date hereof, pay to the said William S. Moore, his heirs or assigns, the sum of five thousand dollars, together with all arrears of rent, and a ratable dividend of the rent for the time which shall have elapsed between the half-year's day then next preceding, and the day on which such payment shall be made, he the said William S. Moore, his heirs and assigns, will execute and deliver any deed or instrument which may be necessary for releasing and extinguishing the rent or annuity hereby created, which, on such payment being made, shall forever after cease to be payable.

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"In testimony whereof," &c. Scholfield afterwards sold the premises to the plaintiff, subject to this rent charge.

This cognizance or avowry was filed by the defendant on the 30th of November, 1827; and the plaintiff (after *oyer* of the deed) demurred to the cognizance, and assigned the following causes of demurrer :

1st. Because the said deed of indenture shows, upon the face of it, a corrupt and usurious contract between Jonathan Scholfield and W. S. Moore, altogether void in law, and entirely incompetent to justify the taking of the said goods and chattels in the plaintiff's declaration mentioned.

2d. Because the essential parts of the indenture are not set forth in the cognizance.

3d. Because the indenture is variant and different from that alleged in the cognizance, and

4th. Because the cognizance is void and insufficient in law to justify the taking of the said goods and chattels.

The defendant joined in demurrer, and, (as permitted by the Virginia law of December 12, 1792, c. 66, § 39, p. 80,) after *oyer* of the deed, filed four special pleas.

1. "The said John saith that the said Charles, as bailiff of the said William S. Moore, for the reasons before alleged, ought not justly to acknowledge the taking of the goods and chattels aforesaid in the said place in which," &c. "Because he saith, that before the making of the said indenture, that is to say, on the 11th day of June, in the year 1814, at the county aforesaid, it was corruptly agreed between the said Jonathan Scholfield and the said William S. Moore, that the said William S. Moore should advance to him the said Jonathan the sum of five thousand dollars, and in consideration thereof that he the said Jonathan and the said Eleanor his wife should grant by a deed of indenture duly executed and delivered to him the said William, his heirs and assigns, forever, a certain annuity or rent of five hundred dollars, to be issuing out of and charged upon a lot of ground and four brick tenements," &c., (describing them as in the deed,) "to be paid to the said William, his heirs and assigns, by equal half-yearly payments," &c., (as stated in the deed); "and it was further corruptly agreed that the said Jonathan, in and by the said deed of indenture, should for himself, his heirs, executors, administrators, and assigns, covenant with the said William, his heirs and assigns, that he would well and truly pay to him the said William, his heirs and assigns, the said annuity or rent of \$500," &c., &c., stating all the terms, conditions, and covenants in the very words of the deed.

"And the said William did further corruptly agree that he would,

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in the said indenture, covenant for himself, his heirs and assigns, with the said Jonathan, his heirs and assigns, that if the said Jonathan, his heirs or assigns, should at any time thereafter, at the expiration of five years from the date of the said indenture, pay to the said William, his heirs or assigns, the sum of five thousand dollars, together with all arrears of rent," &c., (in the words of the deed,) "he the said William, his heirs and assigns, would execute and deliver any deeds or instruments which might be necessary for releasing and extinguishing the rent or annuity thereby agreed to be created, which, on such payment being made, should forever after cease to be payable.

"And the said John saith that afterwards, namely, on the same day and year, at the county aforesaid, the said William, in pursuance and in prosecution of the said corrupt agreement did advance to the said Jonathan the said sum of five thousand dollars, and the said Jonathan and Eleanor his wife, and the said William did, then and there, make, seal, and duly deliver to each other respectively, the said deed of indenture as their several acts and deeds; which said deed was duly acknowledged by the said Eleanor and admitted to record, and so the said John saith that the said deed of indenture in the said cognizance mentioned, was made in consideration of money advanced upon and for usury; and that by the said indenture, there has been reserved and taken above the rate of six dollars in the hundred for the forbearance of the said sum of five thousand dollars so advanced as aforesaid, for the term of one year; and this the said John is ready to verify: wherefore he prays judgment if he ought to be charged with the rent aforesaid; and inasmuch as the said Charles hath acknowledged the taking of the said goods and chattels, he the said John prays judgment and his damages, on occasion of the taking and unjust detaining of the said goods and chattels to be adjudged to him," &c.

2. The second plea was exactly like the first, except that it charged the agreement to be, that Moore should "lend" to Scholfield \$5,000, and that in consideration thereof Scholfield and wife should make the deed; and averred that Moore did, in pursuance and prosecution of such agreement, "advance," (not "lend,") the \$5,000; and Scholfield and wife did make the deed, &c.; "and so the said John saith that the said deed of indenture in the cognizance mentioned was made in consideration of money lent upon and for usury, and that, by the said indenture there has been reserved and taken above the rate of six dollars in the hundred for the forbearance of the said sum of \$5,000, so lent as aforesaid for the term of one year; and this the said John is ready to verify," &c.

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3. The third plea, after *oyer* of the deed, averred, "that before the making of the said indenture, that is to say, on the 11th day of June, in the year 1814, at the county of Alexandria, aforesaid, it was corruptly agreed between the said Jonathan and the said William, that he the said William should advance to him the said Jonathan the sum of \$5,000, upon the terms and conditions and in consideration of the covenants and agreements in the said indenture mentioned and contained; and that in pursuance of the said corrupt agreement, and in the prosecution and fulfilment of the same, the said William did then and there advance to him the said Jonathan the said sum of \$5,000; and the said Jonathan and Eleanor his wife, and the said William did then and there make, and seal, and duly deliver the said deed of indenture to each party respectively as their act and deed; and so the said John saith that the said deed of indenture was made in consideration of money advanced upon and for usury; and that by the said indenture there has been received and taken above the rate of six dollars in the hundred for the forbearance of the said sum of \$5,000, so advanced as aforesaid for the term of one year; and this the said John is ready to verify," &c.

4. The fourth plea was exactly like the third, except that it charged the agreement to be, that Moore should "lend" to Scholfield \$5,000; and that he did lend him the sum of \$5,000; and that the indenture was made in consideration of money lent upon and for usury; "and that by the said indenture there has been reserved and taken above the rate of six dollars in the hundred for the forbearance of the said sum of \$5,000, so lent as aforesaid for the term of one year; and this the said John is ready to verify," &c.

This suit was commenced in Alexandria, D. C., where all the parties resided; but after the cause had been decided in this Court and in the Supreme Court of the United States, upon the demurrers, and before any issue of fact had been made up, it was at the instance of the defendant's counsel removed to Washington on account of the large interest which many persons in Alexandria were supposed to have in the question, as many such annuities or rent charges had been made, and were supposed to be lawful.

The case first came before the Court in Alexandria upon the plaintiff's demurrer to the defendant's cognizance, at November term, 1827, when it was argued by *Mr. Swann*, for the plaintiff, and *Mr. Taylor* and *Mr. Jones* for the defendant.

Mr. Swann contended that the contract was usurious on its face, and that it was competent for the Court to decide whether it was so or not; and cited *Gibson v. Friston*, 1 Call, 70, 73; *Ro-*

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berts v. Trenayne, Cro. Jac. 507; *Richards v. Brown*, Cowp. 776; *Jestons v. Brooke*, Cowp. 797; *Levy v. Gadsby*, 3 Cranch, 180; The Virginia Act of November 23, 1796, c. 209, p. 367; *Spencer v. Janssen*, 1 Atk. 301; 7 Bac. Ab. 199; *Lawley v. Hooper*, 3 Atk. 278; 1 Fonb. 235; *Floyer v. Sherrar*, Amb. 19; *Bacon v. De Butts*, 6 Cranch, 253; *Ellzey v. Lane*, 4 Mun. 66.

Mr. Taylor and *Mr. Jones*, *contra*. The intent must be found, but it does not appear upon this demurrer. The Court cannot infer the intent. The question is whether there be a loan, or a forbearance of an antecedent debt. If it be an annuity it is not usury. This is the purchase of an annuity. There was no obligation upon Scholfield to return the purchase-money. It was never payable, and can never be recovered. There is no difference between a rent-charge and an annuity, as to the question of usury. The price of this annuity is the usual market price, and nothing contrary appears on the face of the deed. The question is, whether it was a *bonâ fide* sale of an annuity, or a cover for a loan. Ord on Usury, 74, 75.

Mr. Swann, in reply.

This is different from an ordinary ground-rent. Here is a personal covenant to pay the rent. Insurance of the houses and assignment of the policy, &c.

The COURT (*nem con.*) was inclined to the opinion that the contract was not usurious upon its face, but at the request of *Mr. Swann* took time to consider until the next term; when

CRANCH, C. J., delivered the opinion of the Court, after stating the substance of the deed of 11th of June, 1814, and the cognizance.

To this avowry the plaintiff demurred, and insisted that the transaction was usurious upon the face of the deed.

That the Court may decide an instrument or contract to be usurious upon its face is not denied, but then the Court cannot look to any thing out of the instrument.

It is contended that this contract was substantially a loan, and to this effect the following cases were cited:

1. *Roberts v. Trenayne*, Cro. Jac. 507. That case was trespass *quare clausum fregit*, against the grantee of a rent-charge for entering for non-payment of the rent. But there the jury expressly found it to be a loan of £150 at an interest of £22 10s. per annum, and that security was given for the repayment. It was objected, that the jury had not found that it was *corruptè agreatum*. But the court said it was sufficient if they found all the circumstances which made it apparent to the court to be usurious, for "*res ipsa loquitur*." And Justice Dodridge said, "If I secure both interest and principal, if it be at the will of the party who is to pay it, it is no usury."

2. *Richards qui tam. v. Brown*, Cowp. 770. This was a case of an annuity forced upon a needy debtor, who came to borrow money. The court decided, from all the circumstances given in evidence at the trial, that the substance of the contract was a borrowing and lending, and that a slight colorable contingency will not take the case out of the statute. The circumstances were very strong to show the annuity to be a mere cover for an usurious loan; none of which circumstances appear, in the present case, as it appears upon the indenture.

3. *Jestons v. Brooke*, Cowp. 797. This case was decided not to be usury, but to be an inequitable demand, and, therefore, not recoverable in an action for money had and received. It does not affect the present case.

4. *Levy v. Gadsby*, 3 Cranch, 186, was cited to show "that the construction of written evidence is exclusively with the court," who may decide on the face of a written instrument, that it imports a usurious contract.

5. *Chesterfield v. Janssen*, 1 Atk. 301 to 305; S. C. 1 Wilson, 295. In consideration of £5,000 advanced to Mr. Spencer, he bound himself to pay £10,000 at the death of the Dutchess of Marlborough, in case he should survive her. It was decided not to be usury.

Mr. Justice Burnett, in p. 340, said, "Suppose a man purchase an annuity at ever such an under price, if the bargain was really an annuity, it is not usury. If on the foot of borrowing and lending money, it is otherwise; for if the court are of opinion the annuity is not the real contract, but a method of paying more money for the reward or interest than the law allows, it is a contrivance that shall not avoid the statute.

"A bargain on a mere contingency, where the reward is given for the risk, and not for the forbearance, is not usurious; for how can it be said, with any propriety, to be for forbearance when the day of payment may never come." Although the case is very long, this is all that seems pertinent to the present case; and this is only the assertion of a general principle which is not denied.

6. *Lawley v. Hooper*, 3 Atk. 278. This was a bill to redeem an annuity granted for the life of the grantor. By the contract it was redeemable upon the payment of £1,050, the original sum given for the annuity, and £75, and all arrears of the annuity. Upon all the circumstances of the case, Lord Chancellor Hardwicke was inclined to think it was "a loan of money turned into this shape to avoid the statute of usury," but he did not think it necessary to determine that point; being of opinion that it was such an agreement as the court ought not to suffer to stand, taking it as an absolute sale.

After the parties had agreed upon the terms of the annuity, and the deed was drawn and ready to be executed, the grantee insisted, that as there was no time limited after which only the grantor might redeem, he should, in case he determined to redeem, pay him £75 more than the original purchase-money of the annuity. This was assented to by the grantor, on account of the pressure of his affairs.

The Lord Chancellor considered this variation of the agreement as "unreasonable," and, therefore, set aside the whole agreement, and considered it as a simple loan of £1,050 upon a lawful interest, and permitted him to redeem upon payment of that sum and interest; the payments of the annuity to be credited so as first to sink the interest and then the principal.

There is nothing in that case to affect the present. The *dictum* of the Lord Chancellor, that it was to be taken to be a loan of money, was founded upon all the circumstances of the case; not upon the face of the instrument alone.

7. *Floyer v. Sherard*, Amb. 19. This case is cited for the *dictum* of Lord Chancellor Hardwicke, that when annuities "are redeemable, the court looks upon it as an evasion of the statute of usury, and only a loan of money."

It does not appear whether, by the word "redeemable," he meant redeemable at the option of the grantor alone, and where the grantee could not compel the grantor to redeem. If that was his meaning, the *dictum* is opposed by several cases in which that circumstance was not deemed sufficient to establish the contract as a loan; and is confirmed by none. See *Murray v. Harding*, 3 Wils. 390; S. C. Bl. Rep. 859. See also the above case of *Lawley v. Hooper*, where, if the clause of redemption were conclusive of the fact of its being a contract for a loan, Lord Hardwicke would probably have placed his opinion upon that ground, and not "upon all the circumstances of the case." See also *Rex v. Drury*, 2 Lev. 7. And in *Chesterfield v. Janssen*, 1 Wils. 295, the same Lord Hardwicke says, "to make a contract usurious, there must be a loan to be repaid at all events with higher interest than the statute permits." See also *Fontaine v. Grymes*, Cro. Jac. 252.

8. *Fontaine v. Grymes*, Cro. Jac. 252; S. C. 1 Bulstr. 36. This was a case of annuity for two lives, "and there being no agreement to have the principal money," it was resolved that it was not usury; "but if there had been any provision made for repayment of the principal, although not expressed within the bond, it had been an usurious agreement."

9. *Rex v. Drury*, 2 Lev. 7. "Brown had a lease of a messuage from the Earl of Suffolk for forty years, at £5 per annum

rent. Brown agreed to assign this term to Drue for £300, but Drue, not having the money, Drury, by agreement with Drue, paid the £300, and took the assignment to himself. Drury then demised the messuage to Drue for thirty-nine and three quarter years, at the rent of £35, of which £5 were to be paid to the Earl of Suffolk, and the remaining £30 to Drury for his own use. Drue covenants to pay the rent, and other usual covenants for repairs, &c.; and Drury covenants, that if at the end of four years, Drue should pay him £300, then the rent shall cease, and he will convey to Drue the residue of the term. And, by Hale, C. J., this was not usury within the statute, for Drue was not bound to pay the £300 to Drury; but, at his election, he might pay this if he would, and thereby determine the rent and have the term; so that it is, in fact, but a bargain for an annuity of £30 per annum for thirty-nine and three quarter years for £300 to be secured in this manner, but determinable sooner at the will of the grantor; but the grantee has no remedy to have again the £300, unless the grantor please to pay it at the end of four years. But if Drury had had any security for the repayment of the £300, or by any collateral agreement this was to be repaid, and this manner of contract contrived to avoid the statute, it would have been otherwise."

10. *Doe v. Chambers*, 4 Camp. N. P. Rep. 1. In this case, Trustram, the borrower of £300 and £600, making £900 from Chambers, assigned a lease, worth £2,000, to Chambers, as security, and took an under-lease from Chambers for seven years, at a rent of £70 per annum. Trustram covenanted to keep the premises in repair, and to pay the insurance and the landlord's taxes. Chambers covenanted that, upon repayment of the £900 within the seven years, he would reassign the lease to Trustram.

Lord Ellenborough, at *Nisi Prius*, thought that the covenant to reassign on payment of the £900 was evidence that the real contract was a loan, and not an annuity, and so instructed the jury.

The cases, already cited, show that that circumstance alone is not sufficient to make the contract usurious. None of those cases were cited at the trial of that cause. It was an off-hand dictum, at *Nisi Prius*; and there were other circumstances, which showed that the whole object of the contract was security for a loan. The assignment of the lease was a security for the repayment of the principal. The chief justice stated the evidence to the jury; not the law.

11. *Ex parte Aynsworth*, 4 Ves. 678. 'This was an agreement to allow 30 $\frac{1}{4}$ per cent. discount for prompt payment of a bleacher's bill. The debtor had become bankrupt, and the commissioners allowed, as I understand the case, an interest of 5 per cent. on

the smaller sum only; that is, they deducted $30\frac{1}{4}$ per cent. upon the bill rendered, and allowed 5 per cent. interest upon the balance. The creditors petitioned the chancellor to be allowed to prove the additional $25\frac{1}{4}$ per cent., and relied on the custom of the trade; but the chancellor refused, saying, "The custom of the trade cannot make the debt more than the money really advanced, with 5 per cent. The creditor cannot have more than 5 per cent. The commissioners have done right." Petition dismissed.

12. *Barker v. Van Sommer*, 1 Br. Ch. C. 149. This was a loan of silks to be sold by a young man to raise money. Lord Chancellor Thurlow considered it as a loan of the sum for which he sold the goods; and set aside the bond given for their estimated value, as being usurious.

13. *Lowe v. Waller*, Doug. 736, was a case of the same kind, at law, in which a bill of exchange given for the estimated value of the goods was deemed usurious and void; it being considered as a cover for a loan of the sum actually raised by the sale of the goods.

14. *Davis v. Hardacre*, 2 Camp. N. P. Rep. 375. In this case the discounter of a bill required the other party to take part of the payment in goods, and it was held that this raised a presumption that the transaction was usurious.

15. *Lee, qui tam v. Cass*, 1 Taunt. 515. Upon discounting a bill, the discounter required that he should be permitted to guaranty the solvency of the acceptor, and should receive for that guaranty a premium of $3\frac{1}{2}$ per cent. This was held to be usury.

These are all the cases which have been cited, in behalf of the plaintiff. The five last-mentioned cases have no bearing upon the present, other than to show, that wherever the real object of a contract is the loan of money at a greater interest than the law allows, it will be deemed usurious.

Upon the present demurrer, no facts are brought into view but those which appear in the deed granting the rent-charge. Here was no previous conversation about a loan of money; no purchase of an annuity at an under price; no remedy to recover the principal; no annuity forced upon a needy debtor to cover a loan; no forbearance; no day of payment.

It has never been decided, that the grantor's right of redemption, alone, made the contract usurious; but the contrary has been expressly adjudged. *Rex v. Drury*, 2 Lev. 7; *Murray v. Harding*, 2 W. Bl. 859; S. C. 3 Wils. 390; *Fontaine v. Grymes*, Cro. Jac. 252; S. C. 1 Bulstr. 36.

The covenant, that in case the rent be in arrear for thirty days and no sufficient distress be found, the grantee might enter and expel the grantor and hold and enjoy the premises as his absolute

estate, is believed to be a covenant usually inserted in the grant of a rent charge; and would, in equity, if not at law, be considered as an authority only to enter and hold to satisfy the rent, and as a security therefor. 3 Cruise on Real Property, 300, (198,) tit. 28, c. 1, § 73.

The other covenants in the deed do not seem to affect the question of usury, otherwise than by corroborating the idea of a sale of an annuity, rather than that of a loan of money.

Upon the whole, we are of opinion, upon this demurrer, that it is not a case of usurious loan, but of a fair purchase of an annuity or rent charge; and as this is the only point argued and submitted to the Court, the judgment must be for the defendant.

After this opinion was delivered, namely, at November term, 1828, the defendant demurred to the plaintiff's four pleas of usury, and the plaintiff joined in demurrer, and the case was submitted without argument to the Court, who rendered judgment for the defendant, being of opinion that the case was not varied by the new pleadings, because every plea refers to the written contract which, the Court had decided, purported upon its face to be a sale of an annuity or rent-charge, and not a loan, as there never was a day of payment, and therefore no forbearance.

The plaintiff obtained a writ of error to the Supreme Court of the United States, who affirmed the opinion of this Court as to the construction of the deed of the 11th of June, 1814; but reversed the judgment of this Court upon the defendant's demurrer to the plaintiff's second and fourth pleas of usury. 4 Peters, 205.

Upon the coming down of the mandate, at November term, 1830, the cause, as before stated, was removed to Washington for further proceedings; the demurrer to the plaintiff's second and fourth pleas being withdrawn, and issue joined thereon by the defendant.

At May term, 1831, at Washington, the cause came on for trial upon the issues of fact joined upon the second and fourth pleas; but the jury could not agree upon a verdict, and the cause was continued until May term, 1832, when a verdict was rendered for the plaintiff.

The defendant moved for a new trial, on the ground that the verdict was against the weight of the evidence. After argument, the COURT, (MORSELL, J., absent,) intimated a strong opinion in favor of the motion, on the ground that the verdict, if not absolutely against evidence, was against an irresistible weight of evidence.

CRANCH, C. J., however, said that the motion for a new trial might stand open until he could have time to look minutely into the notes of evidence taken by the parties, and into the law of the case. And it was agreed that his opinion should be given in

writing by the 1st of October then next, so that if a new trial should be granted, the parties should have time to prepare for it.

In pursuance of that agreement, on the 25th of September, 1832,

CRANCH, C. J., delivered and filed the following opinion, (after stating the second and fourth pleas upon which the issue was joined,) namely :

To each of these pleas there was a general replication and issue, and verdict for the plaintiff.

The defendant has moved for a new trial, and assigned, as reasons therefor,

1. Because the Court misdirected the jury as to the law applicable to the case.

2. Because the jury misconceived the instructions given to them by the Court.

3. Because the verdict was against law.

4. Because the verdict was against evidence.

5. Because the verdict was without evidence.

1. In regard to the instructions of the Court to the jury, as bills of exception have been taken, the Court will not grant a new trial on that ground, although there may be some doubt whether Mr. Scholfield's testimony should have been admitted.

2. As the verdict was general, we have no means of ascertaining whether the jury misconceived or disobeyed the instructions of the Court; but if the evidence did not justify the verdict under those instructions, it may be presumed that the jury misunderstood or disregarded them.

3. If the verdict was justified by the evidence and the instructions of the Court, it cannot be considered as a verdict against law.

4. The fourth reason assigned is, that the verdict was against evidence. If this was the case, a new trial ought to be granted.

It is objected, that there was evidence on both sides, and therefore the verdict cannot be said to be against evidence; and if the verdict was merely against the weight of evidence, the Court cannot grant a new trial.

But there is no rule of law or practice, which forbids a court to grant a new trial where the verdict is against the weight of the evidence. On the contrary, there have been many new trials granted on that ground.

A motion for a new trial is an application to the sound legal discretion of the Court.

They will not always grant a new trial when the verdict is against the evidence; nor will the Court always refuse it where there was evidence on both sides, to be weighed by the jury.

If the evidence be doubtful, and great interests are involved ; if the verdict be conclusive ; if it goes to enforce a forfeiture, or to affect the reputation of the party, or to charge him with a criminal offence ; or to unsettle titles, or to destroy securities deemed valid ; if it be a hard verdict, and seem to the Court unjust ; all these are considerations to guide the discretion of the Court.

The Court has been reminded of the case of *Ross v. Gill*, 1 Wash. 190, where the Court of Appeals of Virginia say, "If the court admit improper evidence, an exception may be taken to their opinion ; but if the question depend upon the weight of testimony, the jury, and not the court, are exclusively and uncontrollably the judges."

But this is not said by the court in reference to a motion for a new trial ; for none was made in that case ; it was said, and it is true in regard to the relative functions of the court and the jury upon the trial of the issue ; and it is because the jury are exclusively and uncontrollably judges of the fact, that the power to grant new trials is given to the court.

The Court has also been referred to the case of *Bogle et al. v. Sullivant*, 1 Call, 561. There, the court below had refused to instruct the jury, that evidence of the handwriting and death of the subscribing witnesses to a bond, was, upon the issue of *non est factum*, sufficient proof of the execution and delivery of the bond ; "but left it to the jury to determine the weight of such evidence."

The judgment was affirmed by the Court of Appeals, who said : "The court sees no difference between this and other cases where the evidence is admitted, and the weight it ought to have is left to the jury, who have a right to decide it." There was no question respecting a new trial.

The case of *Fehl v. Good*, 2 Binn. 495, has also been cited, in which C. J. Tilghman says : "The character of witnesses, and the credit that is due to them, are subjects peculiarly within the province of the jury ; and where the verdict has depended upon these points, the court has always refused to interfere, except in extraordinary cases."

The case of *Griffith and Willing*, 3 Binn. 317, 320, has also been cited. In that case, the fact of partnership depended upon a mass of testimony, written and parol. It did not appear to the judge as it did to the jury. The subject was complicated, and the chief justice, although the verdict was contrary to his expectation, thought best not to disturb it. Judge Yeates was not satisfied with the amount of damages ; but, viewing the verdict in all its different aspects, he could not say that it presented so plain a case of mistake, of law or fact, in the jury, as would justify the

interposition of the court. "The facts," he says, "are much complicated, and we cannot wonder that different inferences should be drawn from them by different minds." This was a question entirely to the discretion of the court. The case establishes no principle.

The case of *Copperthwaite v. Jones*, 2 Dall. 55, has also been cited, where Judge Shippen, in delivering the opinion of the court, said: "New trials are frequently necessary for the purpose of obtaining complete justice; but the important right of trial by jury, requires that they should never be granted without solid and substantial reasons; otherwise the province of jurymen might be often transferred to the judges, and they, instead of the jury, would become the real triers of the facts. A reasonable doubt, barely, that justice has not been done, especially in cases where the value or importance of the cause is not great, appears to me to be too slender a ground for them. But whenever it appears, with a reasonable certainty, that actual and manifest injustice is done, or that the jury have proceeded upon an evident mistake, either in point of law or fact, or contrary to strong evidence, or have grossly misbehaved themselves, or have given extravagant damages, the court will always give an opportunity, by a new trial, of rectifying the mistakes of the former jury, and of doing complete justice to the parties."

The case of *Cogswell v. Brown*, 1 Mass. Rep. 237, only decides the general principle, that a new trial ought not to be granted upon a formal objection, where substantial justice has been done, nor where the party has, under a statute of Massachusetts, a right, in certain circumstances, to a "review," which is, in effect, a new trial at law.

These cases do not show any positive rule of law or practice which prevents a court from granting a new trial, on the ground that the verdict was against the weight of evidence. On the contrary, it will be found that almost all the cases in which new trials have been granted because the verdict was against evidence, have been cases where there was evidence on both sides, and the verdict was against the weight of evidence.

In the case of *Bright v. Eynon*, 1 Burr. 393, Lord Mansfield says: "Trials by jury, in civil causes, could not subsist now without a power, somewhere, to grant new trials. If an erroneous judgment be given, in point of law, there are many ways to review and set it right. Where a court judges of fact, upon depositions in writing, their sentence or decree may, many ways, be reviewed and set right; but a general verdict can only be set right by a new trial, which is no more than having the cause more deliberately considered by another jury, when there is a

reasonable doubt, or perhaps a certainty, that justice has not been done." "Most general verdicts include legal consequences as well as propositions of fact; in drawing these consequences, the jury may mistake, and infer directly contrary to law. The parties may be surprised by a case falsely made at the trial, which they had no reason to expect, and therefore could not come prepared to answer. If unjust verdicts obtained under these, and a thousand like circumstances, were to be conclusive forever, the determination of civil property, in this method of trial, would be very precarious and unsatisfactory. It is absolutely necessary to justice, that there should, upon many occasions, be opportunities of reconsidering the cause by a new trial.

"For a good while," "the granting of new trials was holden to a degree of strictness so intolerable, that it drove the parties into a court of equity;" "and therefore, of late years, the courts of law have gone more liberally into the granting of new trials, according to the circumstances of the respective cases; and the rule laid down by Lord Parker, in the case of *The Queen v. The Corporation of Helston*, seems to be the best general rule that can be laid down upon this subject, namely: 'Doing justice to the party, or, in other words, attaining the justice of the case.'

"The reasons for granting a new trial must be collected from the whole evidence, and from the nature of the case, considered under all its circumstances."

Mr. Justice Dennison added, "That it would be difficult, perhaps, to fix an absolutely general rule about granting new trials, without making so many exceptions to it as might rather tend to darken the matter than to explain it; but the granting a new trial, or refusing it, must depend upon the legal discretion of the court, guided by the nature and circumstances of each particular case, and directed with a view to the attainment of justice."

Mr. Justice Foster "agreed to the propriety of what had been said as to such cases in which the juries give verdicts against evidence, and even to cases where there may be a contrariety of evidence, but where the evidence upon the whole, in point of probability, greatly preponderates against the verdict, which, depending upon a variety of circumstances, is matter of legal discretion, and cannot be brought under any general rule. But in all cases where the evidence is nearly *in æquilibrio*, he declared that he should always consider himself bound to have regard to the finding of the jury; for, *ad questionem facti respondent iuratores*. In such a case, it is not the province of the judge to determine; it ought to be left to the jury."

In the case of *Steinmetz v. Currey*, 1 Dall. 234, Chief Justice McKean says: "Granting new trials depends upon the legal dis-

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cretion of the court, guided by the nature and circumstances of each particular case. The courts of England have granted them where the jury have found a general verdict, and the court has directed a special one. So, where the verdict is against the strength of the evidence, and the trial is peremptory; and where the matter appears to the court to deserve reëxamination, they have likewise frequently ordered a new trial. In the present case the verdict appears to be against the strength of the evidence."

A new trial was granted.

So, in the case *Jackson v. Sternberg*, 1 Caines, 167, Mr. Justice Thompson, in delivering the opinion of the court, said: "The testimony is certainly very contradictory, but none of the witnesses appear to have been impeached. Their testimony, however, may make a very different impression, when put on paper, from what it would to hear them examined. Judging only from the case, the weight of evidence is with the defendant; and, although this, of itself, is not sufficient ground for granting a new trial, in all cases, yet, from the whole that appears, there is well founded reason to believe that justice has not been done, and that another examination of the case ought to be made before the possession is changed. We are, therefore, of opinion that a new trial ought to be granted, on payment of costs."

So, in *Estwick v. Caillaud*, 5 T. R. 425, Buller, J., says: "On an application for a new trial, the only question is, whether, under all the circumstances of the case, the verdict be or be not according to the justice of the case." "If, indeed, the facts be doubtful, and the attention of the jury has been drawn from the consideration of them, that is ground for a new trial; but, if the facts be clear, and those facts have been laid before the jury, we ought not to grant a new trial in order to give the unsuccessful party the chance of obtaining another verdict, if the former verdict be agreeable to the equity and conscience of the case."

In *Norris v. Freeman*, 3 Wilson, 39, a new trial was granted because the verdict was against the weight of evidence.

So, in *Barnewall v. Church*, 1 Caines, 235, a new trial was granted upon the same ground, although there was direct and palpable contradictory testimony.

So, in *Mumford v. Smith*, 1 Caines, 523, Livingston, J., in delivering the opinion of the court, says: "We would not, willingly, disturb a verdict where there had been no contrariety of testimony, or where the proofs are nearly in *æquilibrio*; perhaps not unless their decision was most manifestly against the whole evidence. Such, we think, is the case here." The case, however, shows that there was some evidence in support of the verdict; but the court was of opinion that the verdict was against the weight of the evidence, and granted a new trial.

In *Mount-Edgcombe v. Symmonds*, 1 Price, 278, it was decided that a new trial will be granted on questions deciding important rights, when the judge expressed an opinion, at the trial, contrary to the verdict, although he afterwards reports that he is not dissatisfied with it.

In *Swinerton v. Stafford*, 3 Taunt. 90, it is said, that when there has been only a short time for investigating a question of real property, of a doubtful or obscure nature, and of great value, although conflicting evidence has been left to the jury, and the court does not think their verdict wrong, yet, if the inheritance is to be bound forever, the court will grant a new trial, on payment of costs.

The result of all the cases upon new trial is stated by Starkie (on Ev. part 3, p. 435,) to be this: "In granting or refusing new trials the courts exercise a discretionary power according to the exigency of the case, upon principles of substantial justice and equity."

The questions, then, which arise for the consideration of the court, in the exercise of its discretion in the present case, are,

1st. Whether the verdict is against the justice and equity of the case.

2d. Whether the verdict is against the weight of the evidence.

1. As to the justice and equity of the case.

Every man has a right to make what contracts he pleases, if not restrained by some law; and justice and equity require that such contracts should be executed, if fairly made.

Here no fraud is alleged. Scholfield was not, in any manner, under the power of Moore.

It is true, that Scholfield wanted to raise money to finish his houses, and for other purposes; and Moore wished to invest his money in a permanent and productive fund. The circumstances were, by no means, uncommon. No man sells an annuity or ground-rent, unless he wants to raise money; and no man purchases an annuity or ground-rent unless he wishes to invest his money in a productive fund. There is no evidence of any great and particular pressure upon Scholfield at that time; and certainly of none created by Moore. Scholfield, according to his own testimony, went to Moore and told him he wanted to borrow or to raise a sum of money upon an annuity or ground-rent. The market value of ground-rents, in fee, in Alexandria, was known to both parties, to be ten years' purchase; and it is natural to suppose that irredeemable ground-rents in fee, which were always salable at that rate, and which afforded the means of a permanent investment of money, would be more valuable than a ground-rent redeemable at a short period.

There was no evidence of any circumstance which made it unconscientious in Moore to accept the offer of Scholfield. Moore wished for a permanent investment. Scholfield wished to redeem the rent in a year; and they finally agreed that he should have a right to redeem it at any time after five years.

Surely this was not one of those hard, unconscientious bargains that a court of equity would set aside. It was not the case of a spendthrift heir speculating upon the death of his ancestor; nor of a debtor writhing under the gripe of an unrelenting creditor; nor of a weak and simple man entangled in the net of a crafty one. Each party knew exactly what he was doing. The contract, therefore, if not liable to the objection of usury, was fairly made, and ought to be executed, even if this were a suit between the original parties. But it is not. The present plaintiff bought the property, subject to this incumbrance, and, of course, paid as much less for it as the incumbrance was worth; so that if he now recovers he will have deducted from his purchase-money twice that value. It appears, however, in the evidence, that, to avoid this objection, and to induce and qualify Scholfield to become a witness for him, he has agreed to pay the value of this ground-rent to Scholfield's creditors, in case he should recover in this suit; and, in anticipation of such payment, those creditors have actually released Scholfield from \$5,000 of their claims upon him. But, on the other hand, it appears in the evidence, that the present plaintiff is the principal creditor of Scholfield, and will, in fact, (as Scholfield is indebted to him in a much larger sum, and is insolvent,) derive the principal benefit from this action in case of recovery.

As between this plaintiff and this defendant, therefore, there is no justice or equity on the side of the plaintiff, even if there were between the original parties to the contract; which, clearly, there is not. It is a maxim in equity, *Nemo locupletari debet alienâ jacturâ*.

The verdict, therefore, if the contract was not usurious, is against the justice and equity of the case.

2. The next question is, whether the verdict was against evidence, upon the point of usury.

The pleas aver that Moore lent Scholfield \$5,000, and the issue is joined upon that allegation.

The question, then, is, Did Moore lend the money to Scholfield?

If the real contract between the parties is truly stated in the written instrument, this Court, and the Supreme Court of the United States, have said it was not a loan. Unless there was parol evidence, therefore, from which, in connection with the written, the jury could reasonably infer a different contract, the

verdict, which could only be justified by proof of a loan, was against the weight of the evidence.

The first presumption is in favor of the written contract. When the parties have reduced their agreement to writing, it is *primâ facie* to be presumed that the writing states the agreement truly, and contains all the terms of the contract. The presumption of law is also always against the allegation of fraud, corruption, and violation of law. He who would add to, or derogate from, a written contract, or who alleges fraud, corruption, and violation of law, should prove his allegations clearly.

An agreement, or contract, requires the assent of both parties. The desire, or intent, of one party, to borrow, does not make the contract a loan unless the other party intends to lend. There cannot be a loan without an express or implied obligation, on the part of the receiver, to return the thing, either specifically or in kind; and there cannot be a forbearance of that which the party has no right to demand. The contract prohibited by the Virginia statutes of usury, (of December 8, 1786, p. 37, and November 23, 1796, p. 367,) is a contract to receive something for forbearance, that is, for forbearing to enforce some debt, or right. Unless, therefore, Moore had some right to demand the principal, there could be no forbearance of that principal on his part, and the money he was to receive could not be for forbearance.

The words of the Act of 1796 are, "That no person, upon any contract, entered into upon or after the first day of May next, shall take directly or indirectly, for loan of any money, wares, or merchandise, above the value of six dollars, for the forbearance of one hundred dollars for a year, and after that rate for a greater or lesser sum, or for a longer or shorter time; and all bonds, contracts," &c., "thereafter to be made for payment or delivery of any money or goods so to be lent, on which a higher interest is reserved or taken than is hereby allowed, shall be utterly void."

This Court and the Supreme Court have decided, that neither the covenant by Moore to extinguish the rent after five years, upon the receipt of \$5,000 and all arrearages of rent, nor the right of entry and distress, made the contract a loan. By what evidence, then, did the jury arrive at the conclusion, that the contract was for a loan, and not for the purchase of a ground-rent?

It appeared, by the written instrument, that Scholfield, in consideration of \$5,000, bargained and sold to Moore, an annuity or rent of \$500 in fee, charged upon certain houses and lots in Alexandria, with the right of distress, and of entry and eviction, in case the rent should be in arrear. Scholfield covenanted to pay the rent, and keep the houses insured; and Moore covenanted that if, at any time after five years, Scholfield should pay to

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Moore the sum of \$5,000 with all arrears, Moore would execute a release of the rent.

In order to show that this transaction was a loan, and not, as it purports to be, a sale of a rent-charge, the plaintiff produced Scholfield himself as a witness, made (in the opinion of the Court,) competent by certain releases, who testified that, being in want of money for various purposes, he went to Moore and told him that he wished to borrow or to raise \$5,000 upon an annuity or ground-rent, upon his row of houses, or some of them. He was not certain that he used the term "borrow," but thinks his language was to "borrow or raise." That he did not wish to sell the houses, but wished to have the privilege of returning the money, and extinguishing the annuity after one year. That Moore proposed that the annuity should be irredeemable for ten years; but finally agreed that he should have the privilege of returning the money and extinguishing the annuity after five years. He thinks, but he is not certain, that the agreement was made in Moore's counting-room. That he afterwards met Moore at Mr. Taylor's office, and the deed was executed a few days after that meeting.

This testimony, with that of Alexander Moore, who stated that W. S. Moore was generally reputed to be a lender of money, and the fact admitted or proved, that Scholfield was a man of a speculative turn, and was in the habit of borrowing money, was the principal, if not the only evidence produced on the part of the plaintiff, to support the allegation that the money was lent.

But, instead of proving a contract different from that stated in the written instrument, it seems to me strongly to corroborate it. Nothing was said between the parties respecting a loan. No previous debt existed. No debt was raised at the time. Scholfield, according to his own testimony, wanted to raise the money on an annuity, charged upon his houses. This was his first offer. Whether he used the term "borrow," or not, is quite uncertain, and is wholly immaterial, because it appears by his own testimony that he offered a ground-rent; and that Moore did not desire a return of the money; and that there was no promise nor engagement, either in honor or law, on the part of Scholfield, to return it. According to Scholfield's account of the matter, it seems to me to be as clear and valid a sale of a ground-rent, as it would have been if he had been previously the owner of a ground-rent and had sold it to Moore at ten years' purchase, in the same manner as ground-rents were selling almost daily in Alexandria. There was inadequacy of price. Ten years' purchase had been the uniform market price of ground-rents in fee, for many years. The right of redemption was not, of itself, evidence of a loan. That point was decided by this Court, and by the Supreme Court.

It was a privilege reserved, by Scholfield, entirely for his own benefit. It imposed no obligation upon him to refund the money. It gave no right to Moore to demand it. The right to distrain, and to enter for the non-payment of the rent, and the covenant to insure the houses, were only intended to secure the rent, not a return of the money. Nor does the right of redemption, taken in connexion with the parol evidence, justify an inference that the transaction was a loan; for the parol testimony, as before observed, corroborates the written evidence. There is no repugnance, nor discrepancy, between them. There is no evidence of a preëxisting debt, nor of a newly-created debt. There was never a time when the \$5,000 was a debt due by Scholfield to Moore. There was not, therefore, and could not be, any forbearance of the \$5,000 by Moore, even as the contract is represented by Scholfield himself.

The fact, that Moore was reputed to be a lender of money, cannot, of itself, justify an inference that the transaction was a loan; and even if such an inference could be drawn from such a reputation, it would be rebutted by the particular evidence of the transaction given by Scholfield himself, whose testimony seems to me to justify the strongest inference that no loan was intended; but that both parties understood it as the ordinary transaction of sale of a ground-rent.

I thought, at the trial, and still think, that the testimony of Mr. Scholfield, instead of impeaching the *bona fides* of the written instrument, strongly confirms it.

Viewing the subject in this light, it seems to me that the verdict is not merely against the weight of the evidence, but against the whole evidence.

I deem it unnecessary, therefore, to recur to the strong and clear testimony of Mr. Taylor, who was the agent of Mr. Moore in the negotiation, and who established, to my satisfaction, the *bona fides* of the transaction, as the purchase of a ground-rent; and negatived all intention on the part of Moore, to lend the money, or to advance it with a view to repayment. I think the whole evidence shows that Moore did not wish to lend the money, but desired and intended to invest it in a permanent fund.

But it is said, that the terms were so hard upon Scholfield as to be equivalent to an obligation on his part to refund the \$5,000; and that Moore relied upon the pressure of those terms for a return of his money. But the terms of the sale of the ground-rent were not so hard as they have been represented. They were the usual terms upon which ground-rents were then, and had for twenty years, been sold in Alexandria; and Scholfield might, at almost any time, have purchased equivalent ground-rents at the same price.

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It is evident, that the more beneficial the contract was to Moore the less desirous would he be that the money should be returned ; and the less would be the probability that he would require any engagement on the part of Scholfield, either legal or honorary, to return it ; or that he would reserve a right to demand it ; and unless there was some sort of an obligation on the part of Scholfield to return it, and some sort of a right on the part of Moore to demand it, there could be no forbearance ; nor could there be a contract for forbearance of that which could not be forborne.

This indenture was not an assurance made for payment of the \$5,000. Moore could not, in any form of action upon this instrument, recover that money.

It was only an assurance for the rent, not for the purchase-money. It is not, therefore, such an assurance as is made void by the statute.

It is objected, also, and it is true, that the evidence shows it to be an investment of money at ten per cent. per annum ; but it does not follow that it was a loan. If a man should buy six per cent. corporation stock of Washington at seventy-five per cent. it would be an investment of money at eight per cent. per annum ; yet it would not be usury.

It is also objected, that when the Court, without expressing an opinion upon the evidence, have said it was for the jury to decide upon it, and left it to the jury, saying it is their province to do so, a new trial ought not to be granted, however slight the evidence may be upon which the verdict was founded ; and that to set it aside upon the very point upon which the Court has said it is the peculiar province of the jury to decide, and upon the very point left by the Court to them to decide, is the exercise of a power that cannot be sustained by authority.

But it should be remembered, that the Court is bound to submit all facts in issue to the jury. The Court could not do otherwise. If there be any evidence, however slight, tending to prove the fact, and the Court is not called upon to tell the jury that there is no evidence of the fact, the matter must be left to the jury. The Court is not permitted to tell the jury which scale preponderates. If the doctrine contended for be correct, the Court could never grant a new trial on the ground that the verdict was against the weight of the evidence. The idea of the effect of leaving a matter to the jury, may have been taken from the practice of the English judges at *Nisi Prius*. There, when there is a manifest preponderance of evidence on one side, the judge tells the jury so, plainly ; and almost directs their verdict. But when the scales are nearly balanced, or when there has been contradictory evidence, and the verdict depends upon the credibility of the wit-

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nesses, the judge gives no opinion upon the evidence; but says he leaves the fact to the jury; and in such case a new trial is generally refused. But here, where all facts are left to the jury without the judge's opinion, it would be strange indeed, if the Court should not have the power of granting a new trial where they perceive that the verdict was manifestly against the weight of the evidence. The trial by jury in civil causes, could not long subsist without such a power somewhere, as was justly observed by Lord Mansfield in the case of *Bright v. Eynon*, before cited. Besides, in a general verdict, the jury undertake to decide the law as well as the facts of the case, and it cannot appear upon which ground they decided. If the facts do not coincide with their inclination, they can bend the law. If the jury understood the law of this case as the Court understood it, then it seems to me that the verdict was against evidence. If they understood the evidence as the Court understood it, then I think the verdict was against law.

When, therefore, I consider that the verdict takes away the property of the heirs of Moore, to whom it justly belongs if the contract was not usurious, and gives it to one who has no equitable claim to it, that it works a forfeiture and inflicts a penalty for a supposed offence not *malum in se* but merely *malum prohibitum*; that it goes to change the relative situation of the parties, and is peremptory as to the property; and when I consider the amount of property dependent upon the principles involved in this case; and that the verdict was against the weight of the evidence, it seems to me clear that a new trial ought to be granted, on payment of the costs of the last trial.

THRUSTON, J., concurred in the result of this opinion.

 UNITED STATES v. EDWARD HALL.

Upon the trial of an indictment under the 11th section of the Penitentiary Act for the District of Columbia, for uttering as true a counterfeited bank-note, it is not necessary that the note given in evidence should correspond in words and figures with the note set out in the indictment, with the following averment, namely, "which said false, forged, and counterfeited note is as follows, namely," &c., setting out the note *verbatim et literatim*, with all the words, letters, figures, and numerals, upon the face of the note.

But if the forged note be lost after the indictment found and before the trial, the jury must be satisfied that it corresponded with that set out in the indictment in the names of the cashier and president so far as that there was not, in the one, any letter added or omitted which would vary the sound of the name, and that the note which was passed had upon its face the letters "No." prefixed to the number 15,402, as is set forth in the indictment.

THE indictment against Hall contained two counts.

1st. That he did falsely make, forge, and counterfeit, and did cause and procure, &c., and did willingly aid and assist in falsely making, forging, &c., a certain paper, partly printed and partly written, commonly called a bank-note, and purporting to be a note of the President, Directors, and Company of the Bank of the United States, and to be signed by Nicholas Biddle, president of the said bank, and by W. M'Ilvaine, cashier, which said false, forged, and counterfeited note is as follows, namely:

D 15,402

(20)

No. 15,402

(XX)

The President, Directors and Co. of the Bank of the United States, promise to pay to Thomas C. Spotswood or bearer on demand twenty dollars. Philadelphia, March 4th, 1831.

W. M'ILVAINE, *Cashier.*

N. BIDDLE, *President.*

with intention to prejudice one Samuel Dixon, against the form of the statute in that case made and provided, and against the peace and government of the United States.

2d. The second count charged that he "did pass, and did utter and publish as true a certain other false, forged, and counterfeited paper partly printed and partly written," &c., describing it exactly as in the first count, "which said false, forged, and counterfeited note is as follows," &c., (setting out the note as before,) "with intent to prejudice one Samuel Dixon, he the said Edward Hall at the time he so passed the said false, forged, and counterfeited note, and uttered and published the same as true, then and there well knowing the said note to be false, forged, and counterfeited, against the form of the statute," &c.

No evidence was offered under the first count.

By the eleventh section of the Act of Congress of the 2d of March, 1831, [4 Stat. at Large, 448,] "for the punishment of crimes in the District of Columbia," usually called the Penitentiary Act, it is enacted among other things, "That every person duly convicted" "of having passed, uttered, or published, or attempted to pass, utter, or publish, as true, any such falsely made, altered, or counterfeited paper writing or printed paper to the prejudice of the right of any other person, body politic," &c., "knowing the same to be falsely made," &c., "with intent to defraud such person," &c., "shall be sentenced to suffer imprisonment and labor," &c.

At the trial it appeared that the forged note had been purloined from the District Attorney, in the court-room, since the indictment was found; and secondary evidence was admitted, without objection.

Mr. R. S. Coxe, for the defendant, prayed the Court to instruct the jury, that if they shall believe, from the evidence, that the

note, passed by the defendant, did not correspond, in words and figures with that set out in the indictment, then the jury ought to find their verdict for the defendant.

But the COURT (CRANCH, C. J., *contrà*,) refused to give the instruction.

MORSELL, J., thought that a variance in an unessential matter, such as a number, or mark, &c., which forms no part of the note would not be sufficient to exclude it from the jury.

THRUSTON, J., doubted, whether, as this was a prosecution under the eleventh section of the Penitentiary Act, it was necessary to set out the note *in hæc verba*, because that section makes no distinction between different kinds of papers, such as notes, receipts, bills of exchange, bonds, &c., and makes it equally penal to forge, &c. any paper writing, to the prejudice of the right of any person, with intent to defraud such person. He also observed that the prayer is too general; and does not provide for the exceptions, such as mere misspelling where it is *idem sonans*, &c.

CRANCH, C. J., was of opinion that the note produced in evidence should correspond in words and figures with that set out under the averment, "which note is as follows;" and although the note, in this case, is lost, yet the jury must be satisfied that the note passed was such as is set out, and although it might not have been necessary to set out the marks and numbers appearing upon the face of the note yet, being set out, they ought to be proved as giving identity to the instrument.

The COURT, then, at the prayer of the defendant's counsel, (THRUSTON, J., *contrà*,) instructed the jury, that unless they should believe from the evidence that the note passed by the defendant was in fact false and counterfeit, and known by him to be so, and that it corresponded with that set out in the second count of the indictment, in the names of the cashier and president so far as that there was not in the one any letter added or omitted which would vary the sound of the name; and that the note, so passed, had upon its face the letters "No." prefixed to the second 15,402 as is set forth in the said second count, then the jury ought not to find the traverser guilty upon that count.

Verdict guilty, on the second count. Sentence, two years labor in the penitentiary.

CARRINGTON v. FORD & CHAPMAN.

A note signed "Ford & Chapman," (they being partners and joint contractors,) and payable to the plaintiff, was held not to be admissible evidence to support an averment that the note was made by the defendants, their own handwriting being thereto subscribed (not charging them as partners) and payable to the plaintiff, "or order."

Ward v. Corporation of Washington.

Bail will not be discharged, upon leave to amend the declaration, unless the amendment charges a cause of action different from that upon which bail was given. An amendment conforming the declaration to the cause of action upon which bail was given will not authorize a discharge of the bail.

THE declaration charged that the defendants, not charging them as partners, made their promissory note, their own proper hand being thereto signed, and thereby, one day after date thereof, promised to pay to the plaintiff, "or order," \$74.93 for value received by them. The note produced in evidence was signed "Ford & Chapman," in the handwriting of Chapman only; and was not payable to the plaintiff, "or order," as charged in the declaration.

Mr. Redin, for the defendants, objected that the note was not signed by the defendants nor payable to the plaintiff, "or order."

The COURT thought both objections fatal; but permitted the plaintiff to amend his declaration on payment of the costs of this term.

Mr. Redin then moved the Court to exonerate the bail, and cited *Wilson's Administrator v. Berry*, in this Court at May term, 1826, (2 Cranch, C. C. 707,) and *Hyer & Burdett v. Smith*, at May term, 1829, (3 Cranch, C. C. 437,) 1 Chitty, 246; *Kerr v. Cherry*, 2 B. & P. 358; and *Wilk v. Adcock*, 8 T. R. 27.

Without the amendment the plaintiff would be nonsuited and the bail discharged.

The note was filed before bail was given.

The COURT (MORSELL, J., *contra*,) refused to discharge the bail.

CRANCH, C. J., said, that the reason for discharging bail, upon amending the declaration, is, that it would be unjust to charge the bail upon a cause of action different from that upon which the bail was originally given; or where the amendment is of a defect existing at the time of entering bail and which would have defeated the plaintiff's action, but for such amendment. In the present case, the amendment prayed is, to make the declaration conform to the original cause of action filed in court at the time of ruling bail and before the declaration was filed; not to cause a variance.

ULYSSES WARD, Appellant, v. CORPORATION OF WASHINGTON,
Appellee.

Under the by-law of the Corporation of Washington, D. C., of the 14th of August, 1819, no person or officer was authorized to grant a license to erect or use a brick-kiln in that city.

The continued use of a brickkiln without license is a single offence, the penalty of

Ward v. Corporation of Washington.

which is, by the by-law, to be measured by the number of weeks it is used; and all the weeks elapsed before prosecution, must be included in that prosecution. But the by-law is so imperfect that it will not sustain a prosecution in any form. It is in the discretion of the Court to allow or refuse costs upon the reversal of the judgment of a justice of the peace.

Under the power to prevent nuisances, and to superintend the health of the city, the corporation had a right to prohibit the erection and use of brickkilns without a license.

THIS was an appeal from the judgment of Robert Clarke, Esq. a justice of the peace for the county of Washington, who had rendered judgments in favor of the corporation upon five separate warrants, for the penalty of ten dollars in each case, for using a brickkiln without license for five successive weeks. The warrants were all issued on the 9th of August, 1831. These penalties were claimed under the third section of the by-law of the 14th of August, 1819.

Mr. Fendall, for the defendant, contended that the corporation had no right to prevent a man from making bricks, unless in such a situation as to be a nuisance. It is not a nuisance *per se*.

Mr. R. S. Coxe, for the plaintiff, claimed the right to require a previous license under the power to lay and collect taxes, and to superintend the health of the city.

Mr. Fendall, in reply, to show that the corporation can exercise no power not expressly given, or not necessary to the exercise of powers expressly given, or in derogation of the general law of the land, cited 1 Bac. Ab., tit. By-law, 544; *Kirk v. Nowill & Butler*, 1 T. R. 124; *Head & Amory v. The Providence Insurance Company*, 2 Cranch, 169; and the charters of 1802, 1804, and 1812.

The COURT (MORSELL, J., doubting,) was of opinion that the corporation had a right to pass such a by-law, under the power to prevent nuisances, and to superintend the health of the city; but reversed the judgments upon the ground stated in the following opinion, delivered by CRANCH, C. J. (*nem. con.*)

On the 9th of August, 1831, five warrants were issued by Robert Clarke, Esq. against Ulysses Ward, at the suit of the mayor, board of aldermen, and board of common council of the city of Washington, for a penalty of \$10 in each case, "for that he the said U. W. did erect and use a brickkiln in the city of Washington, at the county aforesaid, one week, from 1st to the 8th day — July in — year of 1831, without first obtaining a license from the mayor of the said city, contrary to the act or acts of the said mayor, &c., on that subject made and provided."

Each warrant was in the same form, for each of the four successive weeks, ending on the 5th of August, 1831, and all dated on the same 9th of August, 1831.

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They were all tried before the same justice on the 18th of August, and a judgment was rendered in each case for the plaintiff.

From these judgments the defendant appeals.

The by-law of the corporation upon which these warrants were founded, was passed on the 14th of August, 1819. The first section repeals all the previous "acts of this corporation providing for the issuing licenses for erecting or using of slaughter-houses, and brick and lime kilns." The second section enacts, "that any person who shall erect or use a slaughter-house, without first obtaining a license from the mayor therefor," &c., "shall, for each offence, forfeit and pay, on conviction, the sum of \$10," &c.

The third section does not make any provision for granting licenses for brick or lime kilns, by any officer, but prohibits them from being granted for more than a year, and enacts, "that any person who shall, without such license, erect or use a brick or lime kiln, shall incur a penalty of \$10 for every week he continues to use the same without license."

There being no officer authorized to grant a license, it was impossible for the defendant to obtain one; and the by-law, therefore, in effect amounted to a total prohibition of the erection or use of a brick or lime kiln in any part of the world; for it is not, in its terms, limited to the city of Washington. Such an act would be void for want of power in the corporation.

But if the by-laws were in force, and if the mayor had authority to grant a license for a brickkiln, yet the using of a brickkiln is a single offence, the penalty of which is to be measured by the number of weeks it was used; so that all the weeks which elapsed before the prosecution, should have been included in one prosecution. The offence cannot be divided into several parts, according to the number of weeks during which the defendant continued to use the kiln. The use had been continued for five weeks, before the commencement of these five prosecutions, which were all commenced on the 9th of August, 1831. If there could be judgment at all, it could be only in one of them.

But the by-law is so imperfect, that we think it will not support a prosecution in any form.

We are, therefore, of opinion, that the judgments in these five cases should be reversed; and that in the other two cases in which the judgment of the justice was in favor of the defendant, the judgments should be affirmed with costs.

Mr. Fendall, for the defendant, then prayed the Court that the judgment upon the reversal should be with costs, and cited *Montalet v. Murray*, 4 Cranch; 47; *McIver v. Wharton*, 9 Wheat. 650; Maryland law, 1785, c. 80, § 6; *Clerk v. Harwood*, 3 Dall. 342; 12 East, 768.

Mr. Coxe, contra, cited Mr. Justice Baldwin's opinion in 5 Peters, 724.

At a subsequent term in 1835, the Court ordered the reversal to be with costs; the cause having been continued under *curia advisare vult*.

HENRY JOHNSON v. JESSE BROWN.

It is not actionable to say of a white man, that he is "a yellow negro," "a villain and a liar;" although the plaintiff had previously intermarried with a white woman, which marriage would have been unlawful, if he had been a negro or mulatto; there being no *colloquium* respecting the marriage, nor any marriage averred. Neither the Constitution of Maryland, nor any statute of that State, or of the United States, deprives a colored person, merely as such, of any civil rights of a citizen. Mere words of disgrace, unless written and published, are not actionable.

THE defendant demurred to the declaration in slander.

Messrs. Key and Dunlop, for the plaintiff, cited the Maryland law of 1717, c. 13, § 5; *Eden v. Lagarè*, 1 Bay, 169; *Wood v. King*, 1 Nott & McCord, 185; *Atkinson v. Hartley*, 1 McCord, 103, 203; Starkie on Slander, 19, note; *Id.* 21.

Mr. R. S. Coxe, for the defendant, cited Starkie on Slander, 47.

The case being submitted on those authorities, CRANCH, C. J., delivered the opinion of the Court, (*nem. con.*) as follows:—

Slander; in saying of the plaintiff, "he is a yellow negro, son of a bitch, a villain, and a liar."

The declaration avers, that the plaintiff is a free white male citizen of the United States, and had contracted matrimony with a free, white, female citizen of the United States. That the defendant, knowing the premises, and maliciously intending to bring the plaintiff into disgrace, and to subject him to the pains and penalties of the laws made and provided against mulattoes or negroes contracting matrimony with white women, and the other disabilities of that class of people, on the 8th of November, 1830, at Washington, &c., in a certain discourse of and concerning the plaintiff, said, "he," meaning the said plaintiff, "is a yellow negro, son of a bitch, a villain, and a liar;" meaning thereby that the plaintiff was stained with black blood, and was of negro or mulatto origin, and, as such, subject to the laws and penalties and disabilities provided for, and relating to, that class of people. By means of the speaking of which, &c., the plaintiff is hurt in his good name, &c., insomuch that divers good citizens, to whom his innocence was unknown, have, from the time of the speaking of the said words, hitherto, "suspected the plaintiff to be guilty as charged, and refuse to have intercourse with him," &c. to his damage of \$5,000.

To this declaration there is a general demurrer, and the questions are,

1st. Are these words actionable *per se*?

2d. If not, are they actionable connected with the averment that the plaintiff had married a white woman, and that that fact was known by the defendant at the time of speaking and publishing the words, and that he spoke them with intent to subject the plaintiff to the pains and penalties prescribed by the laws against mulattoes and negroes contracting matrimony with white women; and without the averment of a *colloquium* respecting the marriage?

1. The words spoken do not charge that the plaintiff, being a free negro or mulatto, intermarried with a white woman; but merely that the plaintiff was a yellow negro. They do not charge the plaintiff with any offence; nor do they charge him with being in any condition which subjects him to legal disabilities. Neither the Constitution of Maryland, nor any statute of that State, or of the United States, deprives a colored person, merely as such, of any civil rights of a citizen.

It is true that in the slaveholding States, a general rule of evidence has been adopted, by which every person having negro blood, is presumed to be a slave until the contrary is proved; and such a person may be liable to some inconvenience in proving his freedom; but whether his liability to that inconvenience, is sufficient ground to make the words actionable, I have great doubt. They contain no imputation of crime, nor of moral turpitude; and mere words of disgrace, unless written and published, are not actionable.

It is, indeed, actionable to say of a man, he is excommunicated; but it is because he is liable to the writ *de excommunicato capiendo*; so, to say that he is outlawed; for he is liable to the writ of *capias utlegatum*. But to say of a man that he is a yellow negro, does not subject him to any arrest to which a white man is not equally liable.

The case of *Eden v. Lagarè*, 1 Bay, 169, (Anno, 1791,) cited by the counsel for the plaintiff, in which it was held to be actionable to call a white man a mulatto, was decided upon the ground that, by the laws of South Carolina, a mulatto is deprived of all his civil rights, and liable to be tried, in all cases, without a jury. See, also, *Wood v. King*, 1 Nott & McCord, 184, and *Atkinson v. Hartley*, 1 McCord, 203, (Anno, 1821.)

We do not perceive any principle in the present case, which makes the words actionable in themselves.

2. The second question is, whether they are actionable taken in connection with the other averments in the declaration. These

averments are, that the plaintiff had intermarried with a white woman; that this was known by the defendant at the time of speaking the words; and that he spoke them with intent to subject the plaintiff to the pains and penalties provided by law against mulattoes or negroes contracting matrimony with white women. These pains and penalties may extend to slavery for life, unless the offender was born of a white woman, in which case the penalty is servitude for seven years. The words, however, do not charge him with this offence, nor is it alleged that they were spoken in reference to the marriage. Without such an allegation, we think the action cannot be supported, and that, therefore, the judgment upon the demurrer ought to be entered for the defendant.

See also 2 Saund. 307; *Ludwell v. Hole*, 1 Strange, 696; *Davis v. Miller*, 2 Ib. 1196; Starkie on Slander, 292, 293, 302; *Alliston v. Moore*, Hetley, 167; *Carn v. Osgood*, 1 Lev. 280; *Aston v. Blagrove*, Ld. Raym. 1369; *Savage v. Robery*, Salk. 694.

Judgment for the defendant.

CIRCUIT COURT OF THE UNITED STATES.

OCTOBER TERM, 1832, AT ALEXANDRIA.

NEGRO DELILAH *et al.* v. GEORGE JACOBS *et al.*

Where civil rights are acquired under a foreign law, this Court will enforce them. The compact between Virginia and Maryland, does not prevent Maryland from prohibiting the importation of Virginia slaves from Virginia.

THIS was a suit for freedom.

The plaintiffs claimed their freedom under the law of Maryland of 1796, c. 67, (or the act of 1783,) by being imported from Virginia into Maryland by a Mr. Childs, a citizen and resident of Maryland, who gave no list of them to be recorded, &c.

Mr. Neale, for the defendant, contended that this was a penal law of Maryland, which this Court, sitting in this county, could not enforce.

But the COURT (*nem. con.*) said, that where civil rights are acquired under a foreign law, this Court will enforce them; and that this point in regard to the right of freedom, had been frequently decided by this Court.

Mr. Neale also cited the 12th section of the compact between Virginia and Maryland, which authorizes the citizens of each State to bring their effects into the other State free of duty; and contended that Maryland could not prohibit her own citizens from bringing their slaves from Virginia into Maryland.

But the COURT (*nem. con.*) said that the compact only prohibited the imposition of duties by Maryland, on the goods of citizens of Virginia, brought from Virginia, and *vice versâ*, but did not prohibit Maryland from prohibiting her own citizens from importing slaves, or any other property, belonging to them.

W. T. SWANN'S ADMINISTRATRIX v. TENCH RINGGOLD, Marshal of the District of Columbia.

The marshal of the District of Columbia is not entitled to poundage, upon the arrest of a debtor on a *ca. sa.* in Alexandria county, who has been discharged from such arrest, by order of the plaintiff, without payment.

CRANCH, C. J., delivered the opinion of the Court.

Swann's Administratrix v. Ringgold.

At April term, 1829, a rule was obtained by William T. Swann's administratrix, on the marshal, to show cause, on the 9th of May following, why he should not refund to her the sum of \$47.53, received by him, from her, for commissions included in a prison-bonds bond, by him taken under a writ of *ca. sa.*, in her favor, against G. A. Brown; or so much of the said sum of \$47.53, as exceeds the fees allowed by law for the service of the said writ, and for taking the said bond, upon the following case agreed.

"On the 13th of April, 1826, William T. Swann's administratrix issued a *ca. sa.* against G. A. Brown, returnable on the fourth Monday in June following, which was served on Brown, who gave a prison-bonds bond to the marshal."

Before the expiration of the term limited in the prison-bonds bond, the plaintiff gave the marshal the following written order: "The marshal will discharge G. A. Brown, and deliver to him his bounds-bond, as he has made a settlement of his case with me."

That the settlement alluded to in the order to the marshal, consisted in Mr. Brown's allowing the administratrix to set off a judgment which he had obtained against her for \$450.37, with interest from the 27th of April, 1824, and \$11.22, costs against the judgment which she had obtained against him for a larger sum; and to secure the balance due to her, he gave her a deed of trust on some lands in Virginia, which security she still holds; but the lands are wholly insufficient to satisfy the balance due to her; and that she has received no benefit from the arrangement, except the discharge of Mr. Brown's judgment against her.

That, in making the arrangement, she was not deceived as to the value of the lands.

The original judgment of W. T. Swann's Administratrix v. Brown, was for \$3,316.66, with 4 per cent. interest from the 1st of April, 1817, and costs, to be released, except costs, by payment of \$1,525.76, with interest thereon from the 16th of October, 1820, at 4 per cent. *per annum*, till paid.

The condition of the prison-bonds bond was, that the defendant would not depart, &c.

The marshal calculated the amount due upon the *ca. sa.*, as follows:

Debt,	\$1,525.76
Interest,	337.26
Costs,	13.86
Marshal's Fees,	47.53
	\$1,924.41

The case, thus stated, was argued by *Mr. Hewitt*, for the marshal, and by *Mr. Taylor*, for Mrs. Swann, who contended that the marshal was not entitled to a commission of any kind, upon the amount due upon the *ca. sa.* at the time of the service of it upon Mr. Brown.

The COURT, at a previous term, having adjourned the case, for consideration, and requested information as to the practice in Virginia, sundry letters from gentlemen of the bar, and from sheriffs and clerks in Virginia, were laid before the Court, from which it appears that there is no settled practice in that State, upon such a case as the present.

It seems, however, to be the practice for the sheriff to receive his full commissions, if the plaintiff receives his whole debt, and discharges the defendant from custody, on the *ca. sa.* And to receive no commissions if the defendant be discharged under the insolvent law, except upon the sale of the effects which may be surrendered by the debtor.

By the Act of Congress of the 3d of March, 1807, [2 Stat. at Large, 430,] the marshal of the District of Columbia is to receive, for the service of any writ, 50 cents only for each person on whom served; and for taking any bond required by law, 50 cents only; and for such services as were not enumerated in that, or some other act of Congress, he is to receive the like fees and compensation, if performed in Alexandria county, as by the laws of Virginia, in force on the first Monday of December, 1800, were allowed to a sheriff of a county, for the like services.

By the Act of Congress of the 28th of February, 1799, [1 Stat. at Large, 624,] the marshal was allowed, "for sales of vessels, or other property, and for receiving and paying the money, for any sum under \$500, 2½ per cent.; for any larger sum, 1 and ¼ per cent. upon the excess."

No other commission or poundage was expressly given by any other act of Congress. It is, however, by the same act provided, that, "for all other services not therein enumerated, (except as should be thereafter provided,) such fees and compensations as are allowed in the Supreme Court in the State where such services are rendered." But a commission or poundage fee upon a *ca. sa.*, whether the money was paid to the plaintiff or not, was not expressly given.

The reference to the fees and compensation allowed in the State courts, is only to fees and compensation for services not enumerated in some act of Congress. The service of arresting the defendant, and of taking the bond, are enumerated in the Act of 1807, and the services of committing him to prison, and of discharging him, are enumerated in the Act of 1799.

The services, therefore, of arresting and committing the defendant, taking the prison-bonds bond, and discharging him, are all enumerated services.

What service, then, remains to be performed by a sheriff, under a *ca. sa.*, the compensation for which is to be ascertained by reference to the laws of Virginia? Nothing but the fee of 21 cents a day for keeping and providing for a debtor in jail.

The only commission or poundage given by the Act of Virginia of 1792, is for a service which cannot be performed under a *ca. sa.*, namely: "For proceeding to sell on any execution, if the property be actually sold, or the debt paid, the commission of 5 *per centum* on the first three hundred dollars, or ten thousand pounds of tobacco, and two *per centum* on all sums above that; and one half such commission where he shall have proceeded to sale, and the defendant shall have replevied; and no other commission, fee, or reward, shall be allowed upon any execution, except for the expense of removing and keeping the property taken."

The Act of the 10th of December, 1793, § 33, (p. 302,) gives the same commission in precisely the same words, with the same denial of all other commission, fee, or reward upon "any execution."

It is evident, from the purport of these sections, that they refer only to executions upon which property may be taken and sold, and not to a writ of *ca. sa.*, upon which property cannot be taken. So, also, in the 12th section of the Act of December 10, 1793, respecting executions, it is enacted, that, "On all executions," "the sheriff, or other officer, having published notice of the time and place of sale," &c., "at least ten days before such sale, shall proceed to sell by auction the goods or chattels so taken," &c. And the 13th section provides for taking a forthcoming bond, "reciting the service of such execution, and the amount of money or tobacco due thereon, and with condition to have the goods forthcoming at the day of sale," &c.

By the 22d section of the same act, it is provided, that if goods taken in execution will not sell for three fourths of their value, the debtor may give a bond, with surety, to pay the amount within twelve months. A similar provision had been made by the Act of 1787, c. 7, § 3.

These bonds are called replevy bonds; and, upon giving them, the property is said to be replevied.

This provision, however, was repealed by the Act of December 17, 1795, p. 341. But it explains the term "replevied," in the Act of 1792.

By the 32d section of the Act of December 10, 1793, also, it is

enacted, that "when the sheriff shall, under any execution, have fixed the time and place for the sale of the property taken under such execution," &c.

In all these instances, the legislature, although adopting the terms "any execution," or "all executions," seem to have used them only in reference to writs of *fiery facias*; if so, they give no authority to the sheriff to take a commission or poundage upon a *ca. sa.*; yet it is admitted that the practice of the sheriff is to take a commission if he arrest the defendant on a *ca. sa.*, and the plaintiff receives his debt.

By what law is this practice justified?

By the 29th section of the Act of December 10, 1793, the debtor, taken on a *ca. sa.*, may tender property, in discharge of his person, and the sheriff is to sell the property as if taken on a *fiery facias*. Under this section, it is understood to be the practice for the debtor who has thus discharged his body by tendering goods, to give a forthcoming bond, under the 13th section of the same act, in the same manner as if the goods had been taken under a writ of *fiery facias*; which bond recites the service of the execution, and the amount due thereon, including the sheriff's commission, in the same manner as in a bond for the forthcoming of goods taken under a *fiery facias*, according to the 11th section of the Act of December 24, 1794, concerning executions, (p. 326,) which enacts, "that every sheriff or coroner may include his commissions in forthcoming and replevy bonds, taken on any writ of execution; but he shall not demand or receive such commissions on forthcoming bonds unless the same shall be forfeited."

The condition of the bond, required by the act, is, simply that the goods shall be forthcoming on the day of sale. But, it seems, by the language of the section, that the bond may be discharged by the payment of the debt and costs mentioned in the execution; and such was also the purport of the Act of 1726, § 17.

If the property be forthcoming at the day, the sheriff proceeds to sell, and is, then, only entitled to a commission on the amount of sales. The recital of the commission in the bond is then of no avail, because the bond is not forfeited. But if the bond be forfeited, the judgment upon it includes the commission recited in the bond.

But, in the present case, no forthcoming was given. The debtor was committed and discharged by order of the creditor, after giving a prison-bonds bond, which, however, does not alter the law of the case, for the bond was only a substitute for the walls of the prison.

There is no statute of Virginia, in force in this district, or any Act of Congress which expressly gives the marshal a right to a

commission upon service of a *ca. sa.* in any case upon a judgment rendered in Alexandria county.

How, then, did the practice originate, which allows the marshal a commission upon service of a *ca. sa.*, if the debt be paid?

At common law the sheriff was not entitled to any fee for doing his duty; but was to be paid by the king. *Walden v. Vessey*, 1 Latch, 17; S. C. Palmer, 399; S. C. Popham, 173; *Woodgate v. Knatchbull*, 2 T. R. 148.

But it appears by the statute of 3 Ed. 1, c. 26, which prohibits the sheriff from taking any reward for doing his office, that sheriffs had demanded rewards from individuals; and it appears from 29 Eliz. c. 4, which limits their fees, and which is entitled "An Act to prevent extortion in sheriffs," &c., "in cases of execution," that they continued to demand a reward, notwithstanding the prohibition in the statute of Edward.

By the statute of 29 Eliz. c. 4, it is enacted, "That it shall not be lawful," "for any sheriff," &c., "by reason or color of their office, to have, receive, or take, of any person or persons whatsoever, for the serving and executing of any extent or execution, upon the body, lands, goods, or chattels of any person, more or other consideration of recompense, than in this present act is, and shall be, limited and appointed, which shall be lawful to be had, received, and taken, that is to say 12*d.* for every 20*s.* where the sum exceedeth not £ 100, and 6*d.* of and for every 20*s.* being over and above the said £ 100, that he or they shall so levy and extend and deliver in execution, or take the body in execution for, by virtue or force of any such extent or execution."

The statute of 23 H. 6, c. 9, gives the sheriff a fee of 20*d.* for an arrest, and 4*d.* for the bailiff, and 4*d.* for the gaoler, if committed.

These statutes were in force in England at the time of the first settlement of Virginia; they ought, therefore, to be borne in mind in considering the legislation of that State upon this subject.

It was early decided under the statute of Eliz., that the sheriff was entitled to his poundage upon a *ca. sa.* as soon as he had arrested and committed the defendant, and could recover it of the plaintiff in an action of debt.

This was well understood to be the law in England when the Legislature of Virginia, in 1642, passed their law for ascertaining the fees of sheriffs and other officers; by which it was enacted, "That the sheriffs fees shall be as followeth:

For an arrest,	10 lbs. tobacco.
For bond-taking,	10 lbs. "
Going to prison,	10 lbs. "
For serving an execution under 100 lbs. tobacco,	10 lbs. "

Swann's Administratrix v. Ringgold.

If above 100 to 500 lbs. tobacco,	20 lbs. tobacco.
If above 500 to 1000, " "	40 lbs. "
If unto 2000, " "	60 lbs. "
If above 2000, then 10 lbs. upon every 1000.	

For attachment half as much as for execution and accordingly."

These fees were reenacted, in nearly the same words, in 1657, 1661, and 1671.

By the Act of April, 1718, (4 Henning's Stat. 72,) the sheriff's fees were,

For arrest, bond, and return,	30 lbs. tobacco.
For putting into prison and releasement,	20 lbs. "
For serving executions for any debt due in tobacco, 5 per cent. for the first 1000 <i>l.</i> and 2 per cent. for all above 1000 <i>l.</i>	

For serving attachment on goods where they shall be appraised and delivered to the plaintiffs, the same fees as on executions; but when not appraised,

15 lbs. "

For serving attachment upon the body and bond,

20 lbs. "

For keeping and providing for a person in gaol, each day,

10 lbs. "

By the Act of 1732, (4 Henning's Stat. 348,) the sheriff's fee for arrest, &c., is the same as in the former laws; but the fee for serving executions is thus expressed:

"For serving an execution for any debt due in tobacco, 5 per cent. for the first 1000 pounds, and 2 per cent. for all above 1000 pounds.

Due in money 5 per cent. for the first 100 pounds, and 2 per cent. for all above 100 pounds."

These fees were reenacted, in nearly the same words, by the Acts of 1734, 1735, and 1745, and so continued until the year 1788.

It is worthy of observation, that the editor of the edition of the Virginia Laws, published in 1769, in a note to that part of the fee-bill of 1745, which gives the poundage fee upon the service of an execution, refers to the statute of 1764, c. 6, § 8, which prohibits sheriffs from taking commissions from the plaintiff upon the debt due from a debtor committed upon a *ca. sa.* and discharged under the insolvent act; thus showing the opinion of the editor that the Act of 1745 authorized the sheriff to receive his commission or poundage upon the service of a *ca. sa.*

The 8th section of the Act referred to (1764, c. 6, § 8,) is as follows:

"And whereas some doubts and disputes have arisen, whether the sheriffs are entitled to any and what commissions upon the

amount of debts due from persons either committed to their custody in court, or taken upon executions, and who have afterwards taken the benefit of the Act of Assembly made for the relief of insolvent debtors, and been discharged as such, or who, having remained in prison twenty days, are discharged by the sheriff for want of security for the prison fees ; for settling and putting a stop to any further disputes thereon ; Be it further enacted," &c., " that from and after the passing of this act, it shall not be lawful for the sheriffs, or other officers, to demand, receive, or take, of or from any creditor, or suitor, at whose suit or instance any debtor shall be committed to his custody, by the court, or shall be taken in execution and shall afterwards be discharged by taking the oath of an insolvent debtor, or for want of security for the prison fees, any commissions upon the amount of the debt for which such insolvent was in custody as aforesaid, except on the amount of the effects mentioned in the schedule delivered in by such debtor ; nor any other fees or perquisites, than such as are already allowed by law upon the commitment, releasement, and for the maintenance of such debtor."

The 9th section of the same act is also important ; it is as follows :

" And whereas it is represented that some sheriffs have demanded commissions upon the amount of the penalties of bonds or other writings on which judgments have been obtained and executions issued, which is altogether unreasonable and unjust ; be it further enacted, that it shall not hereafter be lawful for the sheriffs, or other officers, to demand, receive, or take any such commissions upon the penalties mentioned or expressed in executions delivered to them to be executed ; but upon the sum, only, by the payment of which such execution is directed to be discharged, from the persons against whom such executions shall be issued ; any former custom or usage to the contrary thereof in anywise notwithstanding."

These statutes seem clearly to recognize the right of the sheriff, at that time, to receive poundage upon the service of a *ca. sa.* whether the debt be paid or not.

But in the year 1788, the language of the fee-bill is materially changed. Instead of giving poundage under the name of a fee for serving an execution, it gives " a commission for proceeding to sell on any execution if the property be actually sold, or the debt paid ; " and one half of such commission, " where the sheriff shall have proceeded to sale and the defendant shall have replevied ; and no other commission, fee, or reward shall be allowed upon any execution, except for the expense of removing and keeping the property taken."

This change of language indicates a change of intention. The commission does not become due upon the service of the execution; but upon proceeding to sell, and upon an actual sale; or upon payment of the debt; or upon giving a replevy-bond; in which last case, only half of the commissions were allowed. The language seems to confine the commission to executions upon which property may be taken and sold; yet it is understood that the practice, under this act, has been to allow the commissions on a *ca. sa.* if the debt be paid.

This construction has probably been grounded on the words, "or the debt be paid." If so, then the commissions on a *ca. sa.* should be limited to the case where the debt is paid, and could not be demanded of the plaintiff until the debt was paid. If the act gives the whole commission when the whole debt is paid, the equity of the act would give part of the commissions when part of the debt should be paid; that is, *pro ratâ*.

When the sheriff receives the money he knows whether the debt, or what part of it is paid, and of course, what part of his commission is due. But when the plaintiff receives the money and orders the defendant to be discharged, the sheriff cannot know to what proportion of his commission he is entitled, and has a right to suppose that the whole debt is paid.

Whether the release of the defendant is conclusive evidence, as between the plaintiff and the sheriff, that the whole debt is paid, may be a question. It seems to me that it is not; but that it is *primâ facie* evidence, and throws the burden of proof upon the plaintiff to show what part of the debt, or that no part of the debt, was paid; and if he does this, the sheriff's commission, if any part of the debt was paid, will be in proportion thereto.

In the present case, the plaintiff in the execution has shown that the debt was not paid at the time of ordering the marshal to discharge the debtor, and has not been paid since. It is admitted that she received no benefit from the arrangement made between her and the debtor, except in the discharge of a judgment which he had obtained against her; and that the security which she received and still holds, is wholly insufficient to satisfy the balance of her claim.

Upon the whole, we are of opinion that the marshal is not now entitled to any commission upon the *ca. sa.* stated in the case agreed, and ought to refund the \$47.53, which he has received for commissions in that case.

WILLIAM T. SWANN'S ADMINISTRATRIX and others v. ELIZA BROWN.

Under the third section of the Virginia statute of usury, every debtor has a right to go into equity, alleging usury, whether he can or cannot prove it without the aid of the defendant's answer, and although judgment at law may have been rendered against him.

BILL IN EQUITY, stating that William T. Swann, in October, 1819, proposed to borrow of the defendant, \$2,300, at ten per cent. per annum, which proposition was acceded to by the defendant; and it was agreed that \$1,000 of it should be secured by a ground rent of \$152 per annum upon, two lots of land, &c., and that the residue should be secured by a bond, with sureties; the rent and interest to be paid half-yearly, with leave to W. T. Swann to redeem the ground rent on payment of \$1,000. He was to retain the loan for three years, but she had a right to demand repayment at the end of any year, upon sixty days' notice; and had a right to enter on the property, if the interest and rent were not punctually paid. That the \$2,300 were advanced on those terms. The lots were conveyed to her in fee, and she leased them to W. T. Swann at \$152 a year, who also gave his bond for \$1,300, according to the agreement, bearing interest at six per cent. per annum. That W. T. Swann died in October, 1830. That \$1,400.30 have been paid by W. T. Swann and his administratrix. That the defendant afterward brought suits at law on the bond against this complainant and the sureties. That those defendants were advised that the contract was usurious, and that if they took the defence at law, and should succeed, the present defendant would lose the debt entirely; but they were not disposed to push the matter to that extremity; and the counsel of these complainants agreed with the counsel of the present defendant at the bar, at the time the judgment was rendered, and in the presence and hearing of the Court, that the plea of usury should be withdrawn, and a judgment rendered upon the bond, with an understanding that these complainants should have the privilege of resorting to a court of equity to have the claim settled, upon the same principles as if she had instituted against the defendant, a bill in chancery for the discovery of the usury. That they have been advised that they are not bound in equity to pay more than the principal debt, and are entitled to have credit for the moneys which the administratrix has paid, to be deducted out of the sum of \$2,300 loaned as aforesaid, and only bound to pay the balance of principal; but that the defendant has issued execution for the whole amount of the bond and interest thereon, &c. Wherefore the complainants pray injunction, &c. &c.

The injunction was granted, but was dissolved as to \$8-9.70, being the balance of the principal after deducting all payments, and \$50 for the supposed costs of this suit.

The defendant demurred to the bill, and answered, admitting the agreement, but denying that it was usurious.

At April term, 1828, the cause came on to be heard upon the demurrer, and was argued by *Mr. Jones*, for the defendant, and *Mr. Taylor*, for the complainants, who cited the case of *Young v. Scott*, 4 Rand. 415, in which the Court of Appeals in Virginia, in 1826, decided that every debtor has a right to go into equity, under the third section of the Virginia statute of usury, whether he can or cannot prove the usury without the aid of the defendant's answer; and that, in all cases of usury, the court of equity, if it give relief at all, will give that pointed out by the statute; that is, will oblige the creditor to accept his principal without any interest.

Upon the authority of that case, the judges were of opinion that this Court, as a court of equity, has jurisdiction of this cause, by virtue of the third section of the Virginia statute of usury of November 23, 1796, (p. 367,) and that the defendant is bound to answer the allegations charging the usury; although the complainants have not stated in their bill that they cannot prove the usury without the aid of the defendant's answer, and although judgment has been rendered at law. That the demurrers, therefore, must be overruled, so far as they proceed upon those grounds.

The plaintiffs had leave to amend their bill; and the injunction, which had been dissolved, was reinstated, as to all but the sum of \$899.70.

The third section of the Virginia statute of usury is in these words:

"Any borrower of money or goods may exhibit a bill in chancery against the lender, and compel him to discover, upon oath, the money or thing really lent, and all contracts, bargains, or shifts which shall have passed between them, relative to such loan, or the repayment thereof, and the interest and consideration for the same; and if, thereupon, it shall appear that more than lawful interest was reserved, the lender shall be obliged to accept his principal money without interest or consideration, and pay costs, but shall be discharged of all other penalties of this act."

The cause having been continued to the present term, was now, by consent, set for hearing, on the bill, supplemental bill, answer, general replication, and demurrer to the supplemental bill and evidence, and having been heard and argued by counsel,

CRANCH, C. J., delivered the opinion of the Court as follows.

The supplemental bill does not substantially differ from the

original bill; but it is somewhat more formal and pointed in its allegations; and it refers to the original agreement signed by Mr. W. T. Swann, and the defendant, which is referred to in an affidavit of Gustavus B. Alexander, and is admitted in the defendant's answer as constituting the original agreement.

That the bond in question was executed in pursuance of that agreement, is apparent by comparing them with each other. That the original agreement thus confessed in the answer, was usurious, is apparent on its face. The bond, therefore, is affected, or infected by that usury.

The only question remaining, is, whether this Court, as a court of chancery, or a court of equity, can now give relief.

That point was decided by this Court upon the former demurrer, which embraced all the causes of demurrer which are now urged.

That decision we believe to be fully warranted, by the judgment of the Court of Appeals of Virginia, in the case of *Young v. Scott*, 4 Rand. 415, which case embraces and decides every point of demurrer made in this. In one particular, this case is stronger for the complainants than that; because, in that case, a judgment at law had been rendered without any reservation of equity; a forthcoming bond had been given, upon an execution issued upon that judgment; the forthcoming bond had been forfeited, and a judgment rendered upon it, without reservation of equity.

Whereas, in the present case, the judgment was confessed, with a saving of the defendant's equity; meaning thereby, no doubt, the defendant's right to apply to a court of equity for the relief given by the statute, as well as relief upon any original equity of which they could not have availed themselves at law.

As the case is clearly made out in favor of the complainants, without resorting to evidence beyond the written contract, the answer and the bond upon which the judgment at law was rendered, we have not looked into the affidavits of the Alexanders, and therefore give no opinion as to their competency as witnesses, or the competency of the matter of the affidavits.

We think the injunction ought to be perpetual, and that the complainants are, under the statute, entitled to costs.

Decree accordingly, *nem. con.*

Reversed by the Supreme Court of the United States, (10 Peters, 497,) who do not seem to have noticed the case of *Young v. Scott*, 4 Randolph, 415, upon the authority of which case, this Court decided the cause.

Tracy v. Scott.

TRACY v. R. M. SCOTT, Executor of Tracy.

Appeals from the Orphans' Court of the county of Alexandria, D. C., are governed by the same rules as in the county of Washington, and must be taken within the time limited by the Maryland Testamentary System, c. 15, § 18.

APPEAL from the Orphans' Court of Alexandria county, District of Columbia, but not taken within the time limited by the Maryland Testamentary System, c. 15, § 18, which is in force in Washington county.

Mr. Taylor, for the appellant, contended that there was no limit to the right of appeal; and that the right of appeal is not governed by the Maryland law in force in Washington county.

But the COURT, upon consideration of the Act of Congress of the 27th of February, 1801, § 12, [2 Stat. at Large, 103,] decided that appeals from the Orphans' Court here, are governed by the same rules as in Washington county, to wit, by the Maryland Testamentary System, c. 15, § 18; and dismissed the appeal, without prejudice to the appellant's equity or other relief.

Mr. Swann, for the appellee.

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1832, AT WASHINGTON.

PETER MAGEE *v.* JAMES CALLAN AND ANDREW CLEMENTS.

Upon attachment of the goods and effects of both and each of two joint debtors, bail must be given for both, to release the joint and separate effects.

Bail will not be received for one only to discharge his separate goods.

The Court will not, upon affidavit, decide whether the effects attached are the joint or several property of the defendants.

ATTACHMENT on warrant, under the Maryland Act of 1795, c. 56, of the joint and separate effects of the defendants, for a joint debt; laid in the hands of the Chesapeake and Ohio Canal Company as garnishees.

Mr. Marbury, for Clements, one of the defendants, offered bail and an appearance for him, to discharge his separate effects.

Mr. C. Cox demanded bail for both defendants; for bail for one would discharge the joint as well as separate property attached.

The COURT (MORSELL, J., *contrà*, or at least doubting,) refused to permit one of the defendants to appear and give bail, unless bail and appearance be entered for both.

The joint effects are attached to compel the appearance of both; and ought not to be given up without the appearance of both; and the defendants cannot be permitted to appear without good bail.

On the next day, *Mr. Marbury* offered an *ex parte* affidavit of Mr. J. P. Ingle, the clerk of the canal company, that the company had no joint effects of the defendants in their hands, but had the separate effects of each; and moved again to appear and give bail for Clements alone, so as to discharge his separate effects, and contended that he had a right, in this manner, to show that no joint effects were attached; and that, in an attachment against a partner for his separate debt, his share or interest in the joint effects may be attached. *Campbell v. Morris*, 3 Har. & McH. 553, and *Wallace et al. v. Patterson et al.* Garnishees of Eyre, 2 Har. & McH. 463.

Butt v. Stinger.

The COURT, however, (MORSELL, J., absent,) said that the affidavit of Mr. Ingle could not be received as sufficient evidence to the Court, in this stage of the cause, that the effects in the hands of the Canal Company, are not joint effects. The plaintiff had a right to have that question tried, either upon interrogatories, or by a jury, upon the issue of *nulla bona*; and this Court could not, in this manner, deprive him of that right.

Bail was then given for both, and the attachment dissolved.

BUTT, Appellant v. STINGER, Appellee.

The condition of an appeal-bond is broken unless the judgment be reversed *in toto*.

APPEAL from the judgment of a justice of the peace. Stinger had obtained judgment before Robert Clarke, Esq., a justice of the peace, against Robert Ritchie, who appealed, and gave an appeal-bond, with Butt as his surety.

The condition of the bond was, that if Ritchie "shall not prosecute his appeal with effect, according to the directions of the act," (the Maryland Act of 1791, respecting small debts,) "and also pay and satisfy to" Stinger, his executors, &c., "in case the said judgment shall be affirmed, as well the said damages and costs adjudged by Robert Clarke, from whose judgment this appeal is made, and also all costs and damage that shall be awarded by the court before whom this appeal shall be heard, tried, and determined, then this bond to remain in full force and virtue, otherwise to be of no effect."

Upon the appeal the judgment was reserved, and the Court, proceeding to give such judgment as the justice ought to have given, rendered a new judgment for a less sum.

Upon this appeal-bond, Stinger warranted Butt, and claimed the amount of the new judgment, and recovered judgment therefor before Mr. Justice Clark. From this judgment on the appeal-bond, Butt appealed.

Mr. Hellen, for the appellant, contended that the condition of the bond was not broken, inasmuch as Ritchie did prosecute his appeal with effect; and the judgment of the justice was not affirmed, but reversed.

Mr. Giberson, for the appellee.

The COURT (CRANCH, C. J., *contrà*,) affirmed the judgment; being of opinion that the judgment against Ritchie was to be considered as affirmed in part; and that the reversal was only necessary in point of form, so as to get at the substantial merits of the

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case; and that the condition of the bond is to be considered as covering any sum which the appellee might recover in this Court.

CRANCH, C. J., was of opinion that the condition of the bond was not broken, and could not be, unless the judgment of the justice should be affirmed *in toto*.

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PATRIOTIC BANK, for the use of Lewis Johnson, v. JOHN A. WILSON.

A person not a party to a note, who takes it up while lying in a bank under protest, and takes a receipt as in payment of the balance due upon the note, cannot, in an action in the name of the bank for his use, recover of the indorser; but if it was a sale or an assignment of the note to him, he may.

LEWIS JOHNSON was indorser of a note of H. Langley, discounted by the Patriotic Bank, which he could not get renewed because another note of Langley, upon which \$57 were due, was lying under protest in the same bank, indorsed by the defendant, Wilson, in blank; he, therefore, paid the balance due on that note, took it up, and took the following receipt, indorsed thereon: "Balance 56.27. Received the above amount of fifty-six $\frac{27}{100}$ dollars of Lewis Johnson, October 19, 1829. H. T. Weightman, Cashier." For which amount the present suit is brought in the name of the bank for his use.

The COURT (*nem. con.*) instructed the jury that if they should be satisfied by the evidence, that the money was received by Mr. Weightman as payment of the note, this suit could not be maintained upon it in the name of the bank; but if they should be of opinion that it was a sale or an assignment of the note, for a valuable consideration, *bonâ fide*, then this suit might be maintained in the name of the bank for the use of Mr. Johnson.

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NEGRO ESTHER, and her two children, v. BERNARD H. BUCKNER.

A citizen and resident of Virginia commenced, *bonâ fide*, removing his furniture and family to Washington, D. C., in November, 1826, and continued such act of removal *bonâ fide*, at intervals during the month of December and up to January 7, 1827, and then, within one year thereafter, introduced the petitioners into the county of Washington, D. C. The Court held, that the petitioners were not thereby entitled to freedom.

But, if he did perfectly, entirely, and completely remove to the city of Washington, and had rented a house and put some part of his family and furniture into it, and claimed the privileges of a resident of that city on or before November, 1826, although he had not removed all his family and property, it was competent for him to bring

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the rest of his family and furniture to Washington after his removal, and his so bringing them after his said removal, did not prevent his being a resident on or before November, 1826.

PETITION FOR FREEDOM. Evidence was offered to the following effect.

The petitioners were brought in from Virginia on the 6th of January, 1828. The defendant, then owner of the petitioners, came to Washington on the 3d of November, 1826, with intent to remove and settle there, and had some of his household furniture in one of the houses called the seven buildings, in that city; and some of his family, namely, two daughters, and some of his servants resided there. His wife and some of his children and some of his furniture did not arrive until about the 7th of January, 1827.

The defendant had, (on the 3d of November, 1826, in order to be able to hire his slaves in this district without incurring the fine of \$20 each, imposed upon slaves of non-residents hired out in the city, by a by-law of the corporation of Washington,) given a list of his slaves, agreeably to that by-law; in which he calls himself Ariss Buckner, residing in the first ward; and, on the 7th of January, 1828, he gave a like list of other slaves brought in within twenty days preceding that date. This last list included the petitioner, Esther, and her two children.

Upon trial of the cause, on the general issue, *Mr. R. S. Coxe*, for the defendant, prayed the Court to instruct the jury, that if they should believe, from the evidence, that *Mr. Buckner*, being a citizen and resident of Virginia, in the month of November, 1826, commenced, *bonâ fide*, moving his furniture and family, and continued such act of removal, *bonâ fide*, at intervals during the month of December, and up to January 7, 1827, then the petitioners, having been introduced into the county of Washington, within one year thereafter, are not entitled to recover; which instruction the COURT (CRANCH, C. J., *contrâ*,) gave.

Whereupon, *Mr. Key*, for the petitioners, prayed the Court to instruct the jury, and they did so instruct them, that if they believe from the said evidence, that the defendant did perfectly, entirely, and completely remove to the city of Washington, in or before November, 1826, (although he had not removed all his family and property,) and claimed the privileges of a resident of that city at that time; and had rented a house and put some part of his furniture and family into it; then it was competent for him to bring the rest of his family and furniture to Washington, after his removal; and his so bringing them here, after his said removal, does not prevent his being a resident before.

Verdict for the petitioners.

The defendant moved for a new trial, which was refused.

ANDREW JACKSON v. JOHN W. SIMONTON.

A marshal of the Southern Judicial District in the Territory of Florida could not lawfully enter on the duties of his office before he had given bond and taken the oath required by the twenty-seventh section of the Judiciary Act of September 24, 1789.

It is not a compliance with the requirement of that act, to give a bond to Andrew Jackson, President of the United States, and his successors in office, not executed by two good and sufficient sureties, inhabitants and freeholders of the district of which he was appointed marshal, and not approved by the judge of that district; and not purporting to be for the faithful performance of the duties of his office by himself and his deputies, and not correctly describing the office to which he had been appointed.

The President of the United States had no authority from the United States to take a bond from a marshal payable to himself and successors, as President.

The judge of the district was the only person designated by the Act of Congress to take the bond and judge of the security, and he could only take it in the name of the United States.

If the marshal was never qualified to enter upon the duties of the office, he could not violate those duties, and his sureties were not liable for any money which the officers of the government might have put into his hands before he was authorized to receive it.

DEBT, on a marshal's official bond taken to Andrew Jackson, President of the United States, and his successors in office.

CRANCH, C. J., delivered the following opinion of the Court, (*nem. con.*)

This cause is submitted to the consideration of the Court upon a general demurrer to the declaration.

It is understood that it was intended to submit to the Court the question whether the bond is, in law, valid against the defendant, who is a surety only, under any form of declaration which the attorney could draw, consistently with the facts in the case; and, consequently, that he may so amend his declaration; and that the defendant had oyer of the bond before he demurred; and that the breach, insisted upon by the plaintiff, is, that the marshal has not accounted to the United States for \$2,500 advanced to him as marshal.

The bond, with its condition and indorsements, is in these words:

"Know all men by these presents that we, John Dean, and John W. Simonton, and John Whitehead, and R. D. Richardson, are held and firmly bound unto Andrew Jackson, President of the United States, and his successors in office, in the penal sum of twenty thousand dollars, for the payment of which, well and truly to be made, we bind ourselves and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, signed, sealed, and dated this 6th day of June, 1829. The condition of this obligation is such, that whereas John Dean aforesaid has been duly appointed marshal of the southern judicial circuit of the United States District Court (at Key West) of the Territory of Florida;

"Now, if the said John Dean will faithfully and impartially dis-

charge all and singular the duties incumbent on him as such, then this obligation to be void, otherwise to remain in full force and virtue. In testimony whereof we have hereunto set our hands, and affixed our seals, this — day of —, in the year of our Lord one thousand eight hundred and twenty-nine, and of the Independence of the United States the fifty-third year.

“John Dean, (seal,) J. W. Simonton, (seal,) J. W. Whitehead, (seal,) R. D. Richardson, (seal.)

“Test. Elizabeth B. Hutchinson, Mary B. Hutchinson.”

On the back of the bond was this indorsement ;

“The within bond is accepted as a temporary compliance with the requirements of the law, and to serve until Mr. Dean can have an opportunity to see the judge and obtain his approbation. M. Van Buren, June 10, 1829.”

Upon this demurrer, the following questions arise.

1st. Was this marshal obliged to give the bond required by the 27th section of the Judiciary Act of the 24th of September, 1789, [1 Stat. at Large, 73,] before he could lawfully enter upon the duties of the office ?

2d. If he was, is this bond a substantial compliance with the requirement of that law, so as to authorize him to enter upon those duties ?

3d. If not, is it a good bond at common law ?

4th. If so, can the condition of it be broken by any act of the said John Dean, before he was authorized by law to enter upon the duties of the said office ?

1. Was this marshal obliged to give the bond required by the 27th section of the Act of 1789, before he could lawfully enter upon the duties of the office ?

By that act the United States were divided into thirteen judicial districts, in each of which a District Court was to be held by a district judge ; and the 27th section provides, “that a marshal shall be appointed in and for each district, whose duty it shall be to attend the District and Circuit Courts, when sitting therein ;” “and to execute throughout the district, all lawful precepts directed to him and issued under the authority of the United States.” “And before he enters on the duties of his office, he shall become bound for the faithful performance of the same, by himself and by his deputies, before the judge of the District Court, to the United States, jointly and severally, with two good and sufficient sureties, inhabitants and freeholders of such district, to be approved by the district judge, in the sum of twenty thousand dollars ; and shall take, before said judge, as shall also his deputies, before they enter on the duties of their appointment, the following oath of office,” &c.

The thirteen districts provided for by that act were, Maine,

New Hampshire, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, Kentucky, South Carolina, and Georgia.

The Constitution of the United States had not, then, been adopted by North Carolina and Rhode Island.

But the 27th section says, "in and for each district;" not each of the said districts. Perhaps the word, said, was intentionally omitted, so that the language of the act might apply to districts thereafter to be formed.

The Act of the 4th of June, 1790, for giving effect to the Judiciary Act within the State of North Carolina, provides that it "shall have the like force and effect," within that State, "as elsewhere within the United States;" and declares that State to be a district, but does not specially provide that there shall be a marshal, [1 Stat. at Large, 126.]

The Act of the 23d of June, 1790, for giving effect to the Judiciary Act within the State of Rhode Island, has the same provisions, [1 Stat. at Large, 128.]

The Act of the 2d of March, 1791, "giving effect to the laws of the United States within the State of Vermont," declares that all the laws of the United States, not locally inapplicable, shall have the same force and effect within the State of Vermont as elsewhere within the United States; makes the State a district, and provides a judge, but no marshal; yet the 7th section recognizes the existence of a marshal by giving him a compensation for taking the census, [1 Stat. at Large, 197.]

The Act of the 31st of January, 1797, giving effect to the laws of the United States within the State of Tennessee, has the same provisions, except that it says nothing of a marshal, [1 Stat. at Large, 496.]

The Act of the 19th of February, 1803, to provide for the execution of the laws of the United States within the State of Ohio, declares that all the laws of the United States not locally inapplicable, shall have the same force and effect, within that State, as elsewhere within the United States. The fourth section provides for a district attorney, and the fifth for a marshal, "who shall perform the same duties, be subject to the same regulations and penalties, and be entitled to the same fees, as are prescribed to marshals in other districts, [2 Stat. at Large, 201.]

The Act of the 3d of March, 1817, [3 Stat. at Large, 390,] respecting Indiana, is in the same words; so is the Act of the 3d of April, 1818, [Ib. 413,] respecting the State of Mississippi; and of the 3d of March, 1819, [Ib. 502,] respecting Illinois; and of the 21st of April, 1820, [Ib. 564,] respecting Alabama; and of the 16th of March, 1822, respecting Missouri.

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By the Act of the 3d of March, 1805, [Ib. 338,] it is enacted, "that the Superior Courts of the several Territories of the United States in which a District Court has not been established by law, shall, in all cases in which the United States are concerned, have, and exercise within their respective territories, the same jurisdiction and powers given, by law, to the District Court of Kentucky District," &c., that is, the jurisdiction and powers of District and Circuit Courts of the United States excepting appellate jurisdiction.

The Act of the 8th of April, 1812, for the admission of the State of Louisiana into the Union, &c., makes the State of Louisiana, and the remnant of the Territory of Orleans, one district, and provides for a judge and attorney, but does not provide for a marshal, otherwise than by enacting that the laws of the United States shall have the same force and effect in that State as elsewhere in the United States, [2 Stat. at Large, 701.]

The Act of the 26th of March, 1804, erected the Territories of Orleans and Louisiana. The eighth section provides for a District Court in the Territory of Orleans, a district judge with the jurisdiction of a District and a Circuit Court; an attorney and a marshal, who was to perform the same duties, be subject to the same regulations and penalties, and be entitled to the same fees, to which marshals in other districts were entitled for similar services, and \$200 for extra services, [2 Stat. at Large, 283.]

By the Acts of the 30th of March, 1822, [3 Stat. at Large, 654,] and 3d of March, 1823, [Ib. 750,] for the establishment of a territorial government in Florida, it is enacted that there shall be a Superior Court for East Florida, and another for West Florida; that there shall be two marshals, one for each of the said Superior Courts, who shall perform the duties, &c., (as in the above Act of the 26th of March, 1804,) and be entitled to the same fees to which marshals in other districts are entitled for similar services.

The Act of the 26th of May, 1824, [4 Stat. at Large, 45,] provides for three Superior Courts in the Territory of Florida, and a marshal for each of the said courts, who shall perform the same duties, &c., as above, &c.

The Act of the 15th of May, 1826, § 9, [Ib. 164,] requires that the marshal of each district (in the Territory of Florida,) shall execute bond, with security to be approved by the said judges, conditioned for the performance of the duties required of the executive officers by the laws of the said Territory, in the sum of \$10,000, which shall be recorded by the clerks of the said courts.

And by the Act of the 23d of May, 1828, [Ib. 291,] it is enacted, "That there shall be another judicial district in the Territory of Florida, to be called the Southern District, embracing all that part of the Territory," &c. "There shall also be appointed an attorney and

marshal who shall exercise all the duties, give the same bond and security, and be entitled to the same salaries, fees, and compensation that is now allowed by law to attorneys and marshals in other districts in the Territory."

This is the act under which Mr. Dean was appointed marshal.

It appears, from a view of all these acts admitting new States into the Union, and creating new judicial districts, that in some instances Congress has supposed that when a new judicial district was created a marshal would be appointed as a matter of course under the general words of the 27th section of the Judiciary Act of 1789, [1 Stat. at Large, 73,] directing "that a marshal be appointed in and for each district;" and that, in other instances they have, in the acts creating new judicial districts, expressly provided for the appointment of a marshal, and declared that he shall perform the same duties as are prescribed to marshals in other districts. In no case have they expressly required that the marshals of these new districts should give the bond and take the oath required by the 27th section of the Act of 1789; but that was among the duties prescribed to the marshals in other districts, and consequently became also the duty of the new marshals. And such has been the uniform practice of the government. The new marshals have always been required to give the bond and take the oath prescribed in the 27th section of the Act of 1789, before entering upon the duties of their office.

The language of the Act of the 23d of May, 1828, is certainly very inaccurate; but it was evidently the intention of the legislature to subject the marshal who might be appointed under that act, to the same duties, regulations and penalties to which marshals in other districts, in the Territory, were subject. Among those duties was that of giving the bond, and taking the oath required by the 27th section of the Act of 1789, as well as that of giving the bond in the penalty of \$10,000 required by the ninth section of the Act of the 15th of May, 1826. This marshal therefore was obliged to give the bond and take the oath required by the 27th section of the Act of 1789, before he could lawfully enter on the duties of his office.

2. Is this bond a substantial compliance with the requirement of that act?

It is clear to us that it is not.

It is not a bond "to the United States;" it is not executed by "two good and sufficient sureties, inhabitants and freeholders of the district" of which he was appointed marshal; nor "approved by the district judge" of that district; nor does it purport to be "for the faithful performance of the duties of his office by himself and his deputies;" nor does it correctly describe the office to which Mr. Dean had been appointed.

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The office created by the Act of the 23d of May, 1828, is that of marshal of the southern judicial district in the Territory of Florida; but the office described in the condition of the bond is that of "marshal of the southern judicial circuit of the United States District Court at Key West, of the Territory of Florida.

3. But may it not be valid as a voluntary bond?

It appears, upon its face, to be taken by the President of the United States, *colore officii*, for it is made payable to him "and to his successors in office." It is not a personal contract, and must have been intended for the use of the United States.

But the President had no authority from the United States to take such a bond, or to enter into any such contract on the part of the United States, with the marshal. The judge of the district was the only person designated by the Act of Congress, to take the bond, and judge of the sufficiency of the security; and he could only take it "in the name of the United States." Nor could the Secretary of State accept any other bond than one given and approved according to the statute; nor authorize the marshal to enter upon the duties of his office until such bond was given. This bond cannot be considered as having been accepted by the United States, because not accepted by the judge who alone had authority from the United States to accept it. It cannot, therefore, be considered even as a voluntary bond; not having been delivered to the proper officer.

4. But if it should be considered as a valid bond at common law, yet there has been no breach of its condition; for if Mr. Dean was never qualified to enter upon the duties of the office, he cannot have violated those duties; and his sureties are not answerable for any money which the officers of the government may have put into his hands before he was lawfully authorized to receive it, and which he may have misapplied, or not accounted for, before he was qualified to act as marshal. He could do no act as marshal until he had given the bond required by the statute, and until it had been received by the proper officer.

No officer of the government can take a valid bond to himself *colore officii*, or in his official character, which he is not specially authorized by law, to take. The officers of the government are not corporations sole. They cannot take bonds to themselves and their successors in office. The successor, as such, cannot maintain an action upon such a bond. The United States can act only by authorized agents. No person can lawfully assume an agency which shall bind the United States.

Upon the whole, then, it seems to us, that this bond is absolutely void.

Judgment for the defendant upon the demurrer.

The following authorities were consulted: *Armstrong v. United*

United States v. Houston.

States, 1 Peters, C. C. Rep. 46 ; *United States v. Hipkins*, 2 Hall's Law Journal, 80 ; *United States v. Morgan*, 3 Wash. C. C. Rep. 10 ; *United States v. Sawyer*, 1 Gal. 86 ; *United States v. Helligas*, 3 Wash. C. C. Rep. 70 ; *United States v. Barker*, 12 Wheat. 559 ; 5 Com. Dig. 207, 219, Officer H. ; 2 Com. Dig. Chancery, 4, D. 12, Obligation, Duress ; *Bartlett v. Willis*, 3 Mass. Rep. 105 ; *Nottingham v. Giles*, 1 Pennington, 120 ; *United States v. Gordon*, 7 Cranch, 287 ; *Speake v. United States*, 9 Cranch, 29 ; *Tingey v. Carroll*, in this Court at May term, 1828 ; 3 Inst. 149 ; 2 Inst. 210 ; *United States v. Nichols*, 12 Wheat. 505 ; *United States v. Kirkpatrick*, 9 Wheat. 720 ; *United States v. Vanzandt*, 11 Wheat. 184 ; Com. Dig. Pleader, 2, W. 25 ; *Norfolk's case*, Hardres, 464 ; *Anonymous*, 2 Salk. 438 ; *Churchill v. Perkins*, 5 Mass. R. 541 ; *Clapp v. Cofran*, 7 Mass. Rep. 101 ; *Beaufage's case*, 10 Co. 100 ; *Morse v. Hodgdon*, 5 Mass. R. 314 ; *Bartlett v. Willis*, 2 Mass. R. 86 ; Buller, N. P. 171, 172 ; *Rex v. Bradford*, 2 Lord Raym. 1327 ; *Scrogs v. Gresham*, Moore, 193, pl. 342 ; S. C., Anderson, 129 ; *Mitchel v. Reynolds*, 1 P. W. 181 ; Shep. Touch. 359, &c. ; *Respub. v. Lacaze*, 2 Dall. 118.

 UNITED STATES v. SAMUEL HOUSTON.

A conviction and sentence of an individual, not a member of Congress, by the House of Representatives of the United States, for a breach of privilege by assault and battery upon a member of the House, for, or on account of words by him spoken in the House of Representatives, in debate, are not a bar to a criminal prosecution by indictment for the assault and battery.

CRANCH, C. J., delivered the opinion of the Court, (*nem. con.*) as follows :

This is an indictment for an assault and battery committed by the defendant upon William Stanbery, a member of the House of Representatives of the United States, from the State of Ohio.

The defendant has submitted his case to the Court upon the evidence stated on the journal of the House of Representatives of the United States, admitting the fact of the assault and battery, under the circumstances stated in that evidence ; and relying upon the plea that he has been heretofore convicted and punished for the same offence, by the House of Representatives.

The whole case is submitted to the Court without argument.

The material facts, as they appear, in the evidence submitted, are substantially these :

Mr. Stanbery, a member of the House of Representatives of the United States, from the State of Ohio, on the 31st of March, last, in debate, in the House, made use of this language :

"The superintendent of the Cumberland Road is not the only officer who had been suffered to continue in office, after proof of his transgressions had reached the President. Was the late Secretary of War removed in consequence of his attempt, fraudulently to give to Governor Houston the contract for Indian rations? I derive my knowledge of this transaction not from the columns of the Telegraph. The whole affair was known to me at the time it took place. The editor of the Telegraph gives himself too much credit for defeating this attempted fraud.

"I understood that it was in consequence of the remonstrances of the delegate from Arkansas that the contract was not completed. There is one fact, however, for which I am indebted to the Telegraph; and that is that the President had full knowledge of the business, and that it did not meet with his disapprobation."

The speech was, at the request of one of the editors of the National Intelligencer, prepared by Mr. Stanbery for the press, and published in that gazette on the 2d of April.

There does not, however, appear to be any evidence that the fact that it was thus prepared for the press by Mr. Stanbery was known to the defendant at the time of the assault and battery mentioned in the indictment.

On the 4th of April, the defendant sent to Mr. Stanbery by Mr. Cave Johnson, a member of the House, the following letter:

"Washington City, April 3, 1832.

"SIR:—I have seen some remarks in the National Intelligencer of the 2d instant in which you are represented to have said, 'Was the late Secretary of War removed in consequence of his attempt, fraudulently to give to Governor Houston the contract for Indian rations?' The object of this note is to ascertain whether my name was used by you in debate, and if so, whether your remarks have been correctly quoted? As the remarks were inserted in anticipation of their regular place, I hope you will find it convenient to reply without delay.

"I am your most obedient servant,

"SAMUEL HOUSTON.

"HON. WILLIAM STANBERY, M. C."

On the 5th of April, Mr. Creighton of Ohio, at the request of Mr. Stanbery, (having previously ascertained that Mr. Johnson was acquainted with the contents of the letter which he had delivered to Mr. Stanbery,) delivered to Mr. Johnson the following letter:

"Hall of Representatives, April 4, 1832.

"SIR:—I received this morning by your hands, a note signed Samuel Houston, quoting from the National Intelligencer of the

2d instant, a remark made by me in the House. The object is to ascertain whether Mr. Houston's name was used by me in debate, and whether my remarks were correctly quoted.

"I cannot recognize the right of Mr. Houston to make this request.

"Very respectfully yours., &c.,

"WILLIAM STANBERY.

"The Hon. CAVE JOHNSON."

This letter was delivered by Mr. Johnson to the defendant in the lobby of the House, behind the speaker's chair.

The defendant was much excited by reading it; used very harsh epithets in regard to Mr. Stanbery; became extremely violent, and said he would whip him before he left the House. This language he used two or three times; and upon Mr. Johnson's arguing with him that it would be a contempt, he replied that "he would right the wrong wherever it was given, even were it in the court of Heaven." But finally desired Mr. Johnson to say to Mr. Stanbery, that he would consider what would be the proper course for him thereafter to pursue.

It appears from the evidence that each party provided himself with a pair of pistols, and a dirk. Indeed it is stated that the defendant always went armed in that manner, and that he declared he would whip Mr. Stanbery wherever he could catch him. It also appears that Mr. Stanbery expected an attack immediately after the delivery of his letter to Mr. Johnson. Several days, however, having intervened without an attack, it seems that Mr. Stanbery was somewhat off his guard, when the attack was made, being armed only with a single pistol. The defendant had no weapon but a walking-cane; which is not otherwise described in the evidence than as being of young hickory. Thus armed, the parties met on the Pennsylvania Avenue, not far from Mr. Stanbery's lodgings, (but on the opposite side,) about half a mile from the Capitol, on the 13th of April, about eight o'clock in a moonlight evening.

Although it seems probable, from the evidence, that the defendant was desirous of an opportunity to attack Mr. Stanbery, yet the meeting, at that time, seems to have been accidental, and not expected by either party. It appears, however, that the defendant, having given the cane to Mr. Shaw, got it back for the purpose, as he said, of chastising Mr. Stanbery. The fact of his having the cane with him, at the time, seems to justify the inference that he had a previous intention to make the attack if he should meet him. While the defendant was standing on the foot pavement, Mr. Stanbery crossed the avenue, and as he stepped up on the pavement, the defendant asked if that was Mr. Stan-

bery ; to which he replied very politely, (and bowing at the same time,) "yes sir ;" "then," said the defendant, "you are the damned rascal," and struck him with a stick which he held in his hand. Mr. Stanbery threw up his hands over his head, and staggered back. His hat fell off. The defendant continued to follow him up, and to strike him. After receiving several severe blows, Mr. Stanbery turned, apparently to go away. The defendant sprung upon him in the rear, (Mr. Stanbery's arms hanging down, apparently defenceless,) seized him and attempted to throw him, but was not able to do so. Whether Mr. Stanbery extricated himself, or the defendant thrust him from him, the witness was not able to determine ; but, as he passed him, the defendant struck him and gave him a trip. Mr. Stanbery fell, and the defendant continued to beat him while lying on the ground. In this situation Mr. Stanbery drew his pistol from his pocket, and attempted to shoot the defendant but the pistol did not go off. The defendant wrested it from the hand of Mr. Stanbery, and continued beating him until he ceased to speak, and laid so still, that the witness thought he was badly hurt, or perhaps killed. The witness was then about to tell the defendant to desist, but, without being spoken to, he quit, of his own accord. Mr. Stanbery then rose. Some altercation passed between them. Mr. Stanbery asked him why he attempted to assassinate him in the night. To which the defendant replied, that he had not attempted to assassinate him, but had chastised him for having traduced his reputation ; and to an observation by some other person, he answered that if he had offended the law he would answer for what he had done. The defendant gave Mr. Stanbery a great many blows ; and the stick, which did not appear, by the sound of the first blows, to be split, did appear, by the sound of the subsequent blows to have been split during the beating. Mr. Stanbery received several violent blows on his head ; one bone in his left hand was fractured ; and his left arm was much bruised. He also received a severe blow on the right arm, at the elbow, and another on the back of his right hand.

On the day after this transaction, Mr. Stanbery addressed a letter to the Speaker of the House, saying that he was waylaid and beaten by the defendant, for words spoken in debate ; confined to his bed, and unable to discharge his duties in the House. To this letter was appended Mr. Stanbery's affidavit, verifying the facts.

The defendant, having been arrested by the order of the House, the following interrogatories were propounded to him :

1. Do you admit or deny that you assaulted and beat the said Stanbery, as he has represented in the letter which has been read,

a copy of which has been delivered to you, by the order of the House?

2d. Do you admit or deny that the same assault and beating were done for or on account of words spoken by said Stanbery, in the House of Representatives, in debate?

1. To the first he answered, as follows:

The accused denies that he assaulted and beat the said Stanbery, as he has represented in the letter which he has read. He admits that he felt great indignation on reading in the *National Intelligencer*, remarks there stated to have been made on the floor of the House of Representatives, by the said Stanbery, imputing to the accused, by name, a gross offence, of which he knows himself to be innocent, and the dissemination of which, throughout the country, by such publication, was evidently calculated to affect his honor and character.

Under these circumstances, the accused was induced to require of the said Stanbery, in a respectful note, whether the report of what he had said was truly set forth in the said paper; to which inquiry, thus made, said Stanbery refused to give any answer, in a manner still further to injure the accused.

The accused admits that he was greatly excited by those provocations, and that, under the influence of feelings thus excited, he did, on accidentally meeting the said Stanbery assault and beat him, the accused being then unarmed with any other weapon than a common walk-cane, and believing the said Stanbery to be, as he, in fact, was, armed with pistols. That the meeting took place several hours after the adjournment of Congress, about 8 o'clock in the evening, on the Pennsylvania Avenue, and nearly half a mile from the Capitol, and on the opposite side of the avenue from where Mr. Stanbery's boarding-house is situated; and, at the time of this occurrence, he was neither seeking for, nor expecting, the said Stanbery.

The accused denies that he intended to commit, or that he believed he was committing, any contempt towards the House of Representatives, or any breach of its privileges, or of the privilege of any of its members.

He denies that the act complained of constitutes any such contempt or breach of privilege, and is prepared to justify his conduct, so far, at least, as the rights and privileges of this House, and its members, are concerned, by proof.

2. To the second, he answered:

"I consider the answer already rendered to the first interrogatory, as embracing an answer to the second."

After examining witnesses, and hearing the argument of the accused, by his counsel, the House of Representatives, on the

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11th of May, "*Resolved*, That Samuel Houston has been guilty of a contempt and violation of the privileges of this House."

"*Resolved*, That Samuel Houston be brought to the bar of the House, on Monday next, at 12 o'clock, and be there reprimanded by the Speaker, for the contempt and violation of the privileges of the House, of which he has been guilty, and that he be then discharged from the custody of the sergeant-at-arms."

On Monday, the 14th of May, when the accused was brought to the bar of the House, to hear his sentence, and receive his reprimand from the Speaker, he had leave to present the following paper, which was ordered to be entered upon the journal of the House.

"The accused, now at the bar of the House, asks leave respectfully to state, that he understands he is now brought here to receive a reprimand from the Speaker, in execution of the sentence pronounced upon him.

Were he to submit, in silence, to such a sentence, it might imply that he recognized the authority of the House to impose it. He cannot consent that it shall be thus implied. He considers it a mode of punishment unknown to our laws, and, if not prohibited by the Constitution, as an 'unusual punishment,' yet, inconsistent with the spirit of our institutions, and unfit to be inflicted upon a free citizen. He thinks proper to add, in making this declaration, that he has been unwilling further to trouble the House; and, although he believes the whole proceedings against him, as well as the sentence he now objects to, unwarranted by the Constitution of his country, yet circumstances may exist to justify or excuse a citizen in determining, (as he has done on this occasion,) to suffer in silent patience, whatever the House may think proper to enforce."

The Speaker then proceeded to execute the sentence of the House, by reprimanding the accused; in doing which, he stated the offence to be "a violation of the rights and privileges of the House of Representatives, in having offered personal violence to one of its members, for words spoken in debate."

The accused was then conducted from the bar of the House, and discharged from the custody of the sergeant-at-arms.

The first question which arises, in this case, is, whether this conviction and judgment of the House of Representatives are a bar to the present prosecution for an assault and battery.

Upon the plea of *autrefois acquit*, or *autrefois convict*, it must appear that the crime for which the defendant was first prosecuted, and of which he was convicted or acquitted, was the same for which he is now prosecuted. 1 Chitty, 453. And the criterion of identity of crimes, is, whether the facts charged in one

indictment would have been sufficient to justify a conviction and judgment upon the other, by the court in which the first conviction was had. For, although the facts charged in the second indictment constitute a part of the matter necessary to support the first, yet, if the facts averred in the second indictment are sufficient, of themselves, to constitute a crime, and the first court has not jurisdiction of the crime thus charged in the second indictment, neither a conviction nor an acquittal upon the first indictment will be a bar to the second.

It is true, that, upon an indictment for murder, a general acquittal or conviction is a bar to a subsequent indictment for manslaughter, upon the same killing. So, an acquittal or conviction, upon an indictment for petit treason, is a bar to a subsequent indictment for murder. So, upon an indictment of grand larceny, a general acquittal or conviction is a bar to a subsequent indictment for petit larceny, for the same taking. But the reason, in all those cases, is, that the defendant may, upon the first indictment, be found guilty of, and punished by that court for, the offence charged in the second. And the reason why he may be so found guilty and punished by that court, upon the first indictment, is, that the nature of the offence is the same, and the only difference is in the degree of punishment, the court having jurisdiction of both.

But, in the present case, the House of Representatives, upon this charge of violating the privileges of the House, could not, if they had found the accused not guilty of the breach of privilege, have proceeded to find him guilty of a simple assault and battery, and to punish him for that offence. It had no jurisdiction of the offence charged in the present indictment. It has not assumed any such jurisdiction. It has professed to act only in vindication of its own privileges; and, although the assault and battery were given in evidence, as a part of the facts to establish the charge of a breach of privilege, it did not constitute the offence for which he was tried.

It is unnecessary, in this view of the case, for this Court to give an opinion whether the House had jurisdiction, as far as they claimed and exercised it. For, if, as the accused contended, up to the last moment of his trial, the House of Representatives had not that jurisdiction, it is clear that their sentence is no bar to the present prosecution; and, if they had that jurisdiction, it does not at all interfere with the jurisdiction of this Court, upon the charge of a simple assault and battery, without the allegation of any fact to justify the jurisdiction exercised by the House.

The opinion, thus expressed by this Court, upon this part of the case, is corroborated by that of the late Chief Justice Parsons,

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of Massachusetts, in the case of *Coffin v. Coffin*, 4 Mass. Rep. 34, 35.

That was an action of slander. The defendant pleaded his privilege, as a member of the House of Representatives of Massachusetts, alleging that the words were spoken in deliberation in the House.

The chief justice, in considering the objection of the danger of conflicting jurisdictions, said —

“I consider the House of Representatives, not only as an integral part of the Legislature, and as an essential part of the two Houses in convention, but also as a court, having final and conclusive cognizance of all matters within its jurisdiction, for the purposes for which it was vested with jurisdiction.” “As to contempts, the House proceeds against the offender, to punish the contempt. Courts of law proceed to punish offences against the State, and to redress private wrongs.” “The same act may be a contempt against the House, an offence against the State, and an injury to an individual; and, in all these respects, proceedings may be had against the offender.” (See, also, Starkie on Slander, 162.) “Let me illustrate the subject by supposing a case or two.

“A member is assaulted in the town in which the House is in session, and is cruelly beaten for words spoken in the House, in the execution of his duty. The House may proceed against the assailant for a contempt; and cannot the member prosecute him at law for damages? And may not the grand jury indict him for a breach of the peace? And neither can the proceedings of a court of law control the proceedings of the House; nor can the proceedings of the House control the courts of law. The judgments of each court, whatever may be the result, can be executed without any interference. Suppose a public officer indicted for extortion, and, upon trial, acquitted at law, cannot he afterwards be convicted by the Senate on an impeachment? Both judgments may be executed without interference. The power of the Senate is censorial, and exercised to preserve purity in office.”

Upon the whole, this Court is of opinion that the conviction and judgment of the House of Representatives, upon the charge of a violation of its privileges, is not a bar to the present prosecution for the assault and battery.

The defendant having submitted to the Court, under the Act of Maryland, 1793, c. 57, § 19, has thereby so far admitted the offence charged, as to render himself liable to the costs of prosecution. The Courts of Maryland, as well as this Court, have always considered such a submission as amounting to a plea of “guilty,” and that nothing remained for the Court to do, but to

declare the punishment; and, in order to guide the Court, in its discretion, in cases where the punishment is discretionary, the Court will, in general, examine the witnesses. Instead of doing this, in the present case, we have been referred to the evidence taken on the trial in the House of Representatives. We have examined that evidence, and in making up our judgment as to the sentence we shall pronounce, we have thrown out of view whatever relates to the violation of the privileges of the House.

We cannot, however, forget the station in life which has been heretofore occupied by each of the parties; the one a Representative in Congress, and the other late governor of one of these United States.

To such stations we look for examples, not only of good order and submission to the laws, but of that self-control and government of the passions which are necessary to the peace of society.

The tone given to society, by the example of such men, is highly important, whether for good or for ill.

If such men can indulge their passions with impunity, how much more excusable are the ignorant and the uneducated.

The law, it is true, looks in mercy upon the infirmity of human nature; but it is only in those cases where the excitement is sudden, and the act follows the provocation, before reason and conscience have time to interfere. But when the passions have had time to cool, and the party has had leisure to consult his judgment and his conscience, and he still entertains a cool and deliberate purpose of revenge, that revenge is no longer entitled to the name of human infirmity; but, in law, takes the name of *malice prepense*; that malice which converts manslaughter into murder, whatever may have been the original provocation.

That the defendant coolly and deliberately meditated the kind of revenge that he took, cannot be doubted from the evidence, nor that the battery was very severe. It is possible that some part of the severity of the beating may have been the consequence of a belief of the defendant, that the party assaulted was armed with deadly weapons, and that it was necessary on the part of the defendant, to be sudden and severe in his attack, to prevent the other from using those weapons. And when the defendant, in fact, found that the other not only had a deadly weapon, but attempted to use it with effect, a new and sudden excitement might have been created, which, with the increased belief that the party assaulted had another deadly weapon, might have led the defendant to inflict a more severe battery than he, at first, contemplated; and may account for some part of the severity, without attributing it to the original malice.

Although the original provocation can be no justification of this

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breach of the peace, yet it ought to be taken into consideration in deciding upon the punishment. We have no means of knowing, judicially, whether the charge supposed to be insinuated in the speech, be true or false. Fraud is not to be presumed; and every man is supposed to be innocent, until proved to be guilty. The charge, if not true, could not fail to wound the feelings of an innocent man. If the battery had taken place immediately upon the first provocation, this consideration would have been of more avail. But, as it is, it has been allowed all the weight which it ought to have.

Upon the whole, then, considering the situation of the parties, their high standing in society, the original provocation, the deliberate revenge, the great outrage upon the public peace, the severity of the battery, and the mitigating circumstances before mentioned, —

The sentence of the COURT is, that the defendant, Samuel Houston, pay a fine of five hundred dollars, and the costs of this prosecution.

UNITED STATES v. EMERY.

The road from Georgetown, D. C., to the Little Falls Bridge, is not a public highway, because the location thereof was not recorded among the records of the Territory of Columbia.

THIS was an indictment for obstructing the highway between Georgetown, District of Columbia, and the Little Falls Bridge, by blasting rocks, &c.

Mr. C. Cox, for the defendant, contended that, as the location of the road had never been "recorded among the records of the Territory of Columbia," as required by the Maryland Act of 1795, c. 44, § 2, it was not a public highway, and therefore the indictment could not be sustained.

And so the COURT instructed the jury. (THRUSTON, J., absent.) See the case of *Conrad Schwarz*, in this Court, at May term, 1831, *ante*, 160.

CIRCUIT COURT OF THE UNITED STATES.

MARCH TERM, 1833, AT WASHINGTON.

UNITED STATES *v.* TOBIAS WATKINS.

It is a long-established principle of the common law, that a man shall not be twice taken in execution for the same cause.

This principle is as applicable to the United States as to other creditors; and under the Maryland law is as applicable to a *ca. sa.* for a fine, as to a *ca. sa.* for any other debt.

THE defendant, having been arrested upon three writs of *ca. sa.* at the suit of the United States, returnable on the first day of the present term, was brought into Court on that day, upon the motion of the Attorney of the United States for this District, and by him prayed in commitment.

The defendant, at the same time, moved the Court to quash the writs, and to be discharged from custody, under the following circumstances, as stated by the Chief Judge in delivering the opinion of the Court.

On the 14th of August, 1829, the defendant having been convicted on three indictments for misdemeanor at common law, and having been in close custody for three preceding months, was sentenced by this Court to three months' imprisonment from that day, on each indictment, making nine months in the whole, and to pay certain fines, amounting altogether to \$3,050, being the exact amount of the money of the United States, which the jury found he had fraudulently obtained, and for which he had not accounted.

The COURT, however, did not order the defendant to stand committed, until those fines and costs should be paid; it not being the general practice of the Court to make such an order, unless at the request of the attorney for the United States; and also knowing that it would be in the power of the United States to issue writs of execution for those fines, if they should deem it proper so to do.

On the 23d of September, 1829, the United States sued out

three writs of *fiery facias* upon those judgments, returnable to the then next term, (December term, 1829.) Those writs were duly returned "*nulla bona*;" and on the 16th of February, 1830, the United States sued out three writs of *ca. sa.* on the same judgments, returnable to the then next May term, (to wit, Monday, the 3d of May, 1830.)

The term of imprisonment, under the sentence, expired on the 16th of May, 1830.

These writs of *ca. sa.* were not returned by the marshal at that term, nor was he called upon to return them; and nothing further appears upon the records of the Court respecting them, until the 10th of January, 1833, when the Court, being in session as of November term, 1832, they were filed in the clerk's office by the late marshal, with the following indorsement thereon: "*Cepi*, delivered over to my successor in office."

On the 14th of January, 1833, being the first day of the term of the Supreme Court of the United States, the defendant applied to that Court for a writ of *habeas corpus*, and a rule was served on the Attorney-General of the United States, to show cause why it should not be granted; and upon that rule the whole merits of the application were fully argued.

The writ of *habeas corpus* was issued, and the defendant was discharged, by the Supreme Court, from the custody of the marshal. On retiring from the court-room, however, he was again arrested upon three new writs of *ca. sa.* upon the same judgments; which writs are the same first before-mentioned, and do not purport to be issued as *alias* writs, nor do they in any manner refer to or notice the former writs of *ca. sa.* They are, in all respects, like the former writs, excepting that they include some additional costs, bear *teste* on the 23d of January, 1833, and are returnable to the first day of the present term, namely, the fourth Monday in March, 1833.

More than a year and a day had elapsed between the *teste* of the former writs of *ca. sa.* and that of the present writs.

Upon these writs the defendant is now held by the marshal in close custody.

Mr. W. L. Brent, for the defendant, upon his motion to quash the writs, contended,

1. That the former arrest upon *ca. sa.* and discharge by the Supreme Court of the United States upon *habeas corpus*, was a satisfaction of the judgment.

2. That the new writs of *ca. sa.* could not lawfully be issued without a *scire facias* to revive the judgments, as more than a year and day had elapsed between the *teste* of the former and the present writs.

3. That the fines were excessive.

Upon the first, which was the principal point argued by the counsel, he cited the following cases and authorities to show that a new *ca. sa.* cannot issue after arrest upon the first, unless under some statute giving the right, not even with the defendant's consent: 2 Tidd, 1068 to 1071; *Foster v. Jackson*, Hob. 59, 60; 9 Petersdorff's Ab. 272, M. note at the bottom of the page; Dalt. Sheriff, 237; 11 Vin. 32, tit. Execution, U. a. pl. 5, 12, 13, (who cites Br., tit. Execution, 151, 13 H. 1;) *Fish & Wiseman's case*, Godbolt, 372; 1 Saund. 35; 2 Har. Ent. 460; *Cappeau v. Middleton*, 1 Har. & Gill, 154; 11 Vin. 24, tit. Execution, T. a. pl. 12, 17; *Jaques v. Withy*, 1 T. R. 559; *Tanner v. Hague*, 7 T. R. 420; 5 Petersdorff, 27, 28, c. 8, tit. *Capias ad Satisfaciendum*; 2 Petersdorff, 221, letter I.; *Line v. Lowe*, 3 Smith, R. 267; *Lynde v. Lowe*, 7 East, 330; *Wright v. Kerswell*, Barnes's Notes, 376; 4 Com. Dig. 238, Execution, c. 10; 1 Roll. 901; 4 Com. Dig. 255, Execution H.; *Pearsall v. Lawrence*, 3 Johns. 514; *Parsons v. Lloyd*, 3 Wilson, 346, 368; *Blackburn v. Stupart*, 2 East, 243; *Yates v. Van Rensselaer*, 5 Johns. 364; *Belchier v. Gansell*, 4 Burr. 2502; *Bishop v. Powell*, 6 T. R. 616; 2 Petersdorff, 307.

The case of *West's Executors v. Hiland*, in 3 Har. & Johns. 200, is the only case which seems to admit a contrary doctrine. But that case is not correctly reported. It was a case of escape, which is admitted to be an exception to the general rule. (A certified copy of the record in that case was produced, which shows it to have been a case of escape.)

If the case were doubtful, the judgment ought to be in favor of liberty. No *ca. sa.* in a criminal case, was known at the common law; nor is it given in criminal cases by any English or British statute. In that country, the defendant is either committed for the fine, or if he is not present in court, the process is *capias pro fine*; by which the officer is to take and keep the defendant till the fine be paid.

Under the Maryland statute of 1777, c. 13, which gives a *ca. sa.* for common-law fines, and which is in force in this county, the proceedings are required to be as in civil cases. If this proceeding would be irregular in a civil case it is irregular in a criminal case. The Act of 1795, c. 74, only gives a *ca. sa.* in statutory fines, the statute of 1777 having given it in common-law fines.

Mr. Key, for the United States, *contrà*.

If an arrest on *ca. sa.* be satisfaction, it is only a technical satisfaction; and the Court will not discharge the defendant without actual satisfaction; even considering the fine as a debt.

An arrest, alone, is not even technical satisfaction; it is such only so long as the arrest continues. To make it a satisfaction, there

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must be not only an arrest, but a discharge by consent of the plaintiff.

The neglect to call upon the marshal to return the writ and bring in the body, and to pray him in commitment in execution, is not a consent by the plaintiff. A *ca. sa.* is only *quousque*, not a valuable execution. The body is only a pledge. It is only satisfaction while it is held. *Blumfield's case*, 5 Co. 86, (b) 88; 4 Com. Dig. 250, Execution, H.; *Foster v. Jackson*, Hob. 59; *Vigers v. Aldrich*, 5 Petersdorff, 27, (Amer. ed.); *Nadin v. Battie & Wardle*, 5 East, 147; *Sharpe v. Spackenagle*, 3 Serg. & R. 465; *Hecker v. Jarrett*, 3 Binn. 404; *Little v. Newburyport Bank*, 14 Mass. Rep. 443; *Lynde v. Lowe*, 7 East, 330.

The consent of the plaintiff must be an actual assent; not an inference from a mere accident, or negligence.

If Dr. Watkins had agreed to dispense with being brought into court and committed, the neglect to have him brought in is not a discharge. His consent to dispense with those matters of form may be implied from his long acquiescence. He was also in jail upon other *ca. sa.*'s in civil causes for debts due to individuals.

The case of *Lynde v. Lowe*, 7 East, 330, does not apply. The arrest in that case was upon *mesne* process, and was superseded because he was not charged in execution within the time limited by the rules of the court. Tidd, 367 to 378. A plaintiff may have a *ca. sa.* upon a judgment in an action of debt upon a former judgment.

These rules of practice were intended to prevent plaintiffs from depriving defendants of the benefit of the Lord's Act of 32 Geo. II., afterwards made perpetual, and other insolvent acts which only applied to debtors charged in execution. Barnes, 376, 383; *Blandford v. Foot*, Cowp. 72. If the rule of court did not extend to all arrests in execution on that judgment, it would not prevent the creditor from defeating the debtor of the benefit of the Lord's Act. *Tappan v. Ryan*, 1 T. R. 273; *Ashley v. Sutton*, Barnes's Notes, 380, tit. Prisoners. The neglect to pray the defendant in commitment, was a mistake in a case of uncertain practice. It was a mutual mistake, not binding on the United States. The attorney of the United States had no authority to discharge the defendant, or to consent to his discharge. *Creary v. Turner*, 6 Johns. 51; *Jackson v. Bartlett*, 8 Johns. 361.

The practice of this Court is, not to have a prisoner who is in actual custody, brought into Court to be committed in execution, especially when the return is, "*cepi in jail.*"

The report of the case of *West v. Hiland*, is justified by the record. It was a second *ca. sa.* after arrest upon the first, upon which the defendant was not prayed in commitment. But

this is really a criminal case, and the rule as to civil cases does not apply. The fine is a punishment, not a debt.

Mr. R. S. Coxe and *Mr. Jones*, in reply.

The opinion of the Supreme Court of the United States in *Ex parte Watkins*, at the last term, was, that the *ca. sa.* must be proceeded upon throughout as in cases of personal actions; and that the omission to charge the defendant in execution was fatal, as to that execution.

An arrest on *ca. sa.* is satisfaction, unless the defendant has escaped, or been rescued. In the case from 14 Mass. Rep. the general principle is maintained, but an exception was allowed in case of a temporary relaxation of custody and a voluntary return; and that case was upon an *audita quærela*, which is an equitable remedy.

After an arrest upon a *ca. sa.* there can be no new execution upon that judgment, unless the defendant die in jail, and then a *feri facias* is given by the statute of James.

The case in 7 East, 330, is stronger than if the party had been charged in execution. The principle was established long before the insolvent acts of England.

As the Court did not decide the second and third points made by the counsel for the defendant, the argument of counsel upon those points is omitted.

CRANCH, C. J., after stating the circumstances of the case, delivered the opinion of the Court, (*nem. con.*) as follows:—

When the marshal, upon the return of a *ca. sa.*, brings into Court the body of the defendant, and the plaintiff prays him in commitment, the order to commit is made of course, unless cause to the contrary be shown. The counsel for the defendant, therefore, were called upon to show cause.

The questions, involved in this discussion, have been fully and ably argued, and the Court has attentively considered the authorities cited, and traced them to their sources, as far as the means they have had, and the intervals between the daily sessions of the Court would permit.

The counsel for the defendant rested their motion to quash the writs of *ca. sa.* and discharge the defendant, upon three grounds:

1. That the defendant could not lawfully be arrested and held in custody upon those writs after having been taken and discharged upon the former writs.

2. That these writs ought not to have been issued without previous *scire facias*, more than a year and day having elapsed between the issuing of them and of the next preceding writs.

3. That the fines were excessive, and amount to a sentence of perpetual imprisonment.

The first question is the most important, as it is one which affects the right of personal liberty ; and is that which seems to have been mainly relied upon in the argument.

The general principle is, that no man shall be arrested again for the same cause.

This principle has been so long and so well established as to have become a maxim in law. *Nemo debet bis vexari pro eadem causâ.*

This rule, according to the English practice, is extended to *mesne* process as well as to execution. Thus, after holding the defendant to bail, the plaintiff shall not discontinue his action because he does not like the bail, and again hold the defendant to bail for the same cause. *Belchier v. Gansell*, 4 Burr. 2502. So in the case of *Imlay v. Ellefsen*, 3 East, 309, it was held, that one who was discharged out of custody upon an arrest in a former action, for default of the plaintiff in not declaring against him in time, cannot be holden to special bail under a second writ for the same cause, although the form of action be changed. The language of the judges, in that case, is not inapplicable to the present. Lord Ellenborough said, "It is likely enough that if the defendant, being a foreigner and not residing in this country, be discharged on filing common bail, the plaintiff will lose his debt ; but that ought not to warp our judgment in applying the law to the facts disclosed to us. There are many cases in the books, where the plaintiff has been suffered to hold the defendant to bail a second time for the same cause of action ; as where he has erroneously commenced his action, or mistaken his remedy, and has discontinued it in due time, without oppression or *laches*. But here the full time elapsed which the law allows for his detaining the defendant in custody upon the first arrest ; and after his discharge he arrested him a second time, and requires the court to aid the former defect in his proceedings or proof, by continuing the defendant in custody for a further period for the same cause of action, which must be sustained by the same proof, and even something more than would have sufficed in the former action. It is harsh enough to deprive men of their liberty as a security for debt in the first instance ; but after having continued the defendant in custody until the plaintiff lost the benefit of it by his own default, I should require a very strong case to induce me to consent to a further imprisonment."

Mr. Justice Grose declared himself of the same opinion. Mr. Justice Lawrence said, "However ill the defendant may have behaved, we are not to punish him by confining him in prison upon a second arrest for the same cause as before."

Mr. Justice Le Blanc said, "The rule would be nugatory that

a party should not be holden to bail a second time for the same cause of action, if, after the first arrest on which the defendant was detained in custody as long as the rules of law would admit, and from which he was discharged on account of the delay of the plaintiff in not declaring against him in time, the defendant should be again liable to suffer, by being holden to bail again in a second action for the same cause."

So in the case of *Blackburn v. Stupart*, 2 East, 243, Mr. Justice Grose said, that "it would be very dangerous to permit the law to be unsettled in this respect; which is, that a person cannot be taken in execution twice on the same judgment, whether he had so agreed or not; and therefore, although the defendant's conduct had been very scandalous, yet the rule must be made absolute to set aside the execution, although the defendant had agreed to be taken again if he did not pay in a given time."

So in *Wright v. Kerswell*, Barnes, 376, if the defendant be superseded after judgment for want of being charged in execution within two terms after judgment obtained, his person cannot afterwards be taken in execution.

The same point is decided in *Lynde v. Lowe*, 7 East, 330; in *Blandford v. Foot*, Cowp. 72; and in *Topping v. Ryan*, 1 T. R. 227, 273.

So in *Dacosta v. Davis*, 1 B. & P. 242, it was held that the condition of a bond to surrender the defendant in execution after he has been once discharged, is void.

So also in *Vigers v. Aldrick*, 4 Burr. 2482, it was decided that a discharge of the defendant out of custody on a *ca. sa.* by consent of the plaintiff, upon a new agreement, not fulfilled, was a satisfaction of the judgment, so that it would not support an action of debt.

So in *Jaques v. Withy*, 1 T. R. 557, it was held that the discharge of a debtor from a *ca. sa.* with the consent of the plaintiff on a new agreement founded on a consideration which failed by reason of informality in the security given, was so far a discharge of the judgment that it could not be set off in a cross suit brought by that debtor against his creditor. Whether the particular decision in that case would now be considered as law, is immaterial; the principle, so far as a discharge of the person of the debtor is concerned, has never been denied, and is in accordance with this whole class of cases.

Mr. Justice Ashhurst said, "But at all events the discharge from execution is certainly a discharge at law. I know of only one case where a debtor in execution who obtains his liberty, may afterwards be taken again for the same debt; and that is where he has escaped; but the reason of that is, that he is not legally out

of custody. But where a prisoner obtains his discharge with the consent of the party who put him in execution, he cannot be retaken."

Mr. Justice Buller, after observing that the security was good at the time it was taken, but that it afterwards became void, said, "That, however, arose from the neglect of the defendant himself in not complying with the directions of the statute." "And the debt, having been once extinguished, cannot be revived again. This is not a new question. The case of *Vigers v. Aldrick*, goes the whole length of this; for it shows that if the defendant has been once discharged out of execution upon terms which are not afterwards complied with, the plaintiff cannot resort to the judgment again, or charge the defendant's person in execution. So here, if the plaintiff has neglected to avail himself of the advantage of the security, it is his own fault, and he must take the consequences."

The same rule of law is also recognized in *Basset v. Salter*, 2 Mod. 136; *Thompson v. Bristow*, Barnes, 205; and *Clark v. Clement & English*, 6 T. R. 525, where it is also decided that a discharge of one joint defendant from execution is a discharge of the others; and Lord Kenyon, in delivering the opinion of the Court, recognizes the authority of the case of *Foster v. Jackson*, Hob. 52, in which it was decided before the Stat. of 21 Jac. c. 24, that if the debtor died in execution the judgment could not be revived against his executors.

So in *Tanner v. Hague*, 7 T. R. 420, where the defendant had been discharged from execution, upon his undertaking to pay the debt at a future day; on non-payment of which the plaintiff sued out a *fieri facias* against him. Upon a rule to show cause why the writ of *fi. fa.* and the proceedings under it, should not be set aside, it was contended by Erskine for the plaintiff that the release of the defendant was conditional; and that as the condition was not performed the plaintiff had a right to sue out another writ of execution. The counsel on the other side, relied on the cases of *Vigers v. Aldrick*, *Jaques v. Withy*, and *Clark v. Clement*; and contended, "that there is only one case, in which the plaintiff can retake a defendant who has been once in execution; namely, the case of an escape." "The court said that the cases cited proceeded on this ground, that it was considered that the plaintiff received a satisfaction in law by having his debtor once in custody in execution; and on the authority of those cases, they made the rule absolute."

So in *Walker v. Alder*, Styles, 117; Trin. 24, Car. B. R. (1671.) With the plaintiff's consent, the defendant, who was in execution, came to the plaintiff out of the prison, thinking to

make some agreement with him ; but no agreement being made, the defendant was taken again, on the same execution. The defendant brought his *audita quærela*, and “adjudged by the court to be well brought for the execution was discharged by the prisoner’s going at large ; and therefore he could not again be taken upon it.”

So in *Price v. Goodrick*, Styles, 387, Mich. 1653, Banc. Sup. “It was said by Roll, C. J., if there be a judgment against three, and one of them is taken in execution and be afterwards set at large by the plaintiff’s consent ; if any of the other two be afterwards taken in execution upon the same judgment, he may have an *audita quærela*.”

So also in *Sir William Fresh’s case*, Godbolt, 372, (3 Car. Anno 1627.) Mr. Justice Dodridge said, “If the execution be lawful, and upon lawful process, and the party be delivered out of execution, then he shall not be taken again in execution. But if he be taken upon an erroneous process, and he be delivered out, he may be taken again in execution, for the first execution is erroneous, and is no record, being reversed.”

So in the Year-Book, 8 H. 7, 9, 10, (Br. Execution, Pl. 92, Anno 1491.) “Error was brought in the rendition of judgment in a writ of debt, and of the proclamation of outlawry therein ; and he found *main-pernors*, but he did not keep his day, and the plaintiff in the debt, prayed a *capias* for execution. Mordant : He was in execution by the main-prize, and therefore he shall have no other execution. The Court. He was not in execution, for the recognizance was only to the king. *Quod nota*,” says the reporter, “And here it appears, once executed, executed forever,” (“*unfoits exec’ ē pro imperpetuo*,”) “for he shall not have execution again.”

So in the Book of Assizes, (*Liber Assisarum*,) (Anno 1372,) fol. 22, pl. 43, Br. Execution, pl. 79. “In trespass, note that if a man have judgment against another for debt or damages, and take his body in execution the plaintiff shall not have *elegit*, nor *feri facias* ; *quod nota*, for the taking of the body, at his suit or prayer, is full execution. And see elsewhere, that if he die or escape the plaintiff shall not have other execution.”

(There are several of these old cases in which it is said that if the defendant escape the plaintiff shall not have other execution, and such was the law held to be in those days, but it is now settled that escape is an exception to the general rule.)

So also in 33 H. 6, 47, (Anno 1455,) Br. Execution, pl. 8. “In debt it was conceded in argument that if a man take the body in execution by *ca. sa.* and the party die in prison he shall not have other execution ; but if he escape, the party shall have

an action of account against the warden," (that is, the warden of the Fleet Prison,) "per *prisot* et per *davers*."

And in 13 H. 7, 1, (Anno 1497,) Br. Execution, 151, it is said by Keble, J., "If the sheriff return *cepi corpus* upon a *ca. sa.* the plaintiff shall not have other execution."

And again, in *Shaw v. Cutteris*, Cro. El. 850, M. 43, Eliz. B. R. Anno 1601, "It was moved, whether the party in execution dying before satisfaction made, the plaintiff may now have a new execution of this judgment," (against the administrator,) "and all the Court held that he could not; for although it were said that he had his body in execution only as a pledge for his debt, and the party dying, the debt is never a whit the more satisfied; and if two be taken in execution, and one of them dies, the other shall remain in execution, for the debt is not satisfied by his death; as 33 H. 6, 48 is; and it was so cited to be adjudged, 26 Eliz., in the Common Bench betwixt *Johns v. Wilcocks*; yet they held that, in regard the plaintiff hath elected this execution, (which is the highest execution,) and the defendant died therein, the law will adjudge it as a satisfaction, when there is but one taken. But where two be condemned, the taking of one in execution is no discharge for the other."

The same point came before the King's Bench again in a more formal manner, and was expressly adjudged in the case of *Williams v. Cutteris*, Cro. Jac. 136, 143; p. 4, Jac. Anno 1606. It was *scire facias* against an executor to show cause why the plaintiff should not have execution of a judgment against his testator. The defendant pleaded that his testator died in execution upon a *ca. sa.* issued upon the same judgment. To this plea the plaintiff demurred, because that execution was not satisfaction; "and it was prayed, inasmuch as he did not plead that satisfaction was given, therefore execution might be awarded. But Tanfield and Yelverton, (the other judges being absent,) held that the bar was good; for when the body of the party is taken in execution, although it be not, in itself satisfaction, yet, as to him, there cannot be any other execution. But if two had been condemned, although the one of them dies in execution, that is not any discharge for the other, because the execution is against both, and it is not satisfaction until the condemnation is satisfied. Yet when execution is against one only, the judgment being against one only, when he dies, no other execution can be against his goods or lands than was in his lifetime; wherefore they held the bar to be good. But because it was a new case, and had not formerly been adjudged, they would be advised," and they took time till the next term to consider.

At Hillary term, the same year, (Cro. Jac. 143,) the case was

moved again, "and Popham, Williams, and Tanfield, held that the plea was good; for when execution is awarded against one person only, and by a *ca. sa.* his body is taken in execution, and is returned, it is an absolute and perfect execution against him, and no other execution can be had against him, his lands, or goods; and although the law saith that it is no satisfaction in itself, yet it is so high that there cannot be any other execution; and when he dies the execution is determined as to him; and there cannot be any other execution of his goods or lands; and not like the case where two are condemned, and the one is taken in execution and dies, yet execution may be against the other; because it is not any satisfaction, and process is not determined against the other; but where the one only is in execution and dies, the executor is discharged, and there cannot be any new execution.

"Yelverton doubted thereof, because it is clear that his body is but a pledge for his debt, and is not any satisfaction in itself; wherefore he said it is not reasonable that the party plaintiff should be deprived of all his remedy by his death. But, notwithstanding, it was adjudged for the defendant."

The same point was afterwards decided by the Court of Common Pleas, in the 12 Jac. (Anno 1614,) in *Jackson's case*, Moore, 857. That was also a *scire facias* against executors, to revive a judgment against their testator.

The defendants pleaded, in bar, that their testator died in execution upon the same judgment; upon which plea, issue was joined, and the jury found a special verdict, which the court adjudged for the defendant. The third question argued, was, "Whether the death of the defendant in execution is a discharge of the execution;" or, as it is stated by Chief Justice Hobart, in his Reports, p. 56, "Whether a man taken in execution, for debt, and dying in execution, the debt be absolutely discharged by his death, as against him." "And all the justices argued the case; and they all agreed, except Winch, that this was a discharge. And they cited a judgment in point, between *Williams and Lambe*, p. 44, Eliz. rot. 88, contrary to *Blumfield's case*, in Coke's 5th Report, wherefore judgment was given against the plaintiff. Note. Pasch. 43 Eliz. in R. R. rot. 88, in *Williams and Catheridge's case*, it was adjudged a full execution by the death, &c."

The opinion of Lord Hobart is given, at full length, in his Reports, p. 52 to 62, where, speaking of executions that have effect, in part, he says, (p. 59,) "But, if a *capias* be executed, that is in law sufficient for the whole debt, for *corpus humanum non recipit estimationem*, so that, if you take it at all, you must take it for the whole debt. And again, I hold that a *capias ad*

satisfaciendum is against that party, as not only an execution, but a full satisfaction by force, and act, and judgment of law; so as, against him, he can have no other, nor against his heir or executor, for these make but one person in law."

Such was the law previous to the 21st of James, notwithstanding the dictum of Lord Coke, in *Blumfield's case*, that in an action in the common pleas, between *Jones and Williams*, "it was resolved by the whole court, that, if the defendant in debt dies in execution, the plaintiff may have a new execution by *elegit*, or *fieri facias*." For that was the case of two men condemned in debt, and one was taken, and died in execution, and yet it was held that the taking of the other was lawful; and such, also, was *Blumfield's case*. Neither of them, nor any other of the cases cited by Lord Coke, supports his dictum, as a general proposition, "that, if the defendant in debt dies in execution, the plaintiff may have a new execution by *elegit* or *fieri facias*." And in Sir Edward Coke's own case, the great case of prerogative, Godbolt, 294, Chief Baron Tanfield said, "If a common person arrest the body in execution, he shall not resort to the lands; contrary to *Blumfield's case*, Coke, 5 part."

So, also, in *Foster and Jackson's case*, (Hob. 60,) Lord C. J. Hobart says, "It is a prerogative of the king to have execution of the body, lands, and goods not communicated to the subject but in case of statute-merchant and staple, and recognizance of that nature, which is by the statute law; and therefore the case put in *Blumfield's*, that, where a party was taken in execution upon a statute, and died, and yet execution was had against goods and lands, after, is nothing in this case, for they were all due, at the first, and therefore might be taken at once, or severally."

So, also, in *Cave v. Fleetwood*, Littleton's Rep. 325, 5 Car. Anno 1629, the plaintiff's counsel having cited *Blumfield's case*, to prove, that, if the defendant die in execution, the plaintiff may have *elegit*; and that it is satisfaction that the law regards, "Hutton, J., said that *Blumfield's case* is not law; for, if the party die in execution upon *capias*, the plaintiff had his execution, and shall not have any execution again; and so was *Jackson's case*, adjudged in this Court; and the making of the statute of 21 Jac. shows, that so the law was held."

So universal was the rule held to be, that the plaintiff should not take the body of the defendant twice in execution, for the same cause, that it was even doubted whether a member of parliament, discharged temporarily, by writ of privilege, could be taken again for the same debt.

Thus, the preamble to the statute 1 Jac. c. 13, (Anno 1604,) recites: "Forasmuch as, heretofore, doubt hath been made if

any person, being arrested in execution, and by privilege of either of the Houses of Parliament, set at liberty, whether the party at whose suit execution was pursued, be forever after barred and disabled to sue forth a new writ of execution in that case; for, avoiding all doubt and trouble, which, in like cases, may hereafter ensue, be it enacted, &c., that the party at whose suit, &c., after such time as the privilege of that session of parliament, in which such privilege shall be so granted, shall cease, may sue forth and execute a new writ or writs of execution in such manner and form as, by the laws of this realm, he or they might have done if no such former execution had been taken forth or served."

So, also, the preamble of the 21 of James, c. 24, (Anno 1623,) says: "Forasmuch as, heretofore, it hath been much doubted and questioned if any person, being in prison, and charged in execution, by reason of any judgment against him, should happen to die in execution, whether the party at whose suit, or to whom such person stood charged in execution, at the time of his death, be forever after concluded and barred to have execution of the lands and goods of the person so dying; and, forasmuch as daily experience doth manifest that divers persons of sufficiency of real and personal estate, minding to deceive others of their just debts, for which they stood charged in execution, have obstinately and wilfully chosen rather to live and die in prison than make any satisfaction according to their abilities, to prevent which deceit, and for the avoiding of such doubts and questions hereafter, be it declared, explained, and enacted," &c., "that the party or parties at whose suit, or to whom any person shall stand charged in execution, may, after the death of the said person so charged and dying in execution, lawfully sue forth and have new execution against the lands and tenements, goods and chattels, or any of them, of the person so deceased, in such manner and form, to all intents and purposes, as he, or they, or any of them might have had by the laws and statutes of this realm, if such person, so deceased, had never been taken or charged in execution."

Thus stood the law in relation to execution by *capias*, when the charter of Maryland was granted, on the 20th of June, 8 Car. (Anno 1642.)

The emigrants, under that charter, brought that law with them, together with all such other rights of English subjects as they could enjoy in their new situation. These rights were expressly guarantied to them by their charter, and were, at the Revolution, confirmed to their descendants, by the Constitution and Bill of Rights of the State of Maryland.

When this part of the district was separated from Maryland, that law, and those rights were expressly continued in force here

by the Act of Congress of the 27th of February, 1801, [2 Stat. at Large, 103,] and as modified by the statutes of Maryland, prior to that date, and by acts of Congress since, now constitute the law of this part of the district.

Maryland continued to adopt, from time to time, such of the statutes of England as were applicable to her situation, up to the time of the Revolution, and kept pace with the judicial tribunals of England, in their modification and extension of the rules of the common law. Hence, the decisions of those tribunals have been considered as authority in the cases to which they are applicable.

The law of execution by *capias*, therefore, as it existed in England, at the time of the Revolution, was the law of Maryland on the 27th of February, 1801, unless altered by the statutes of that State. We are not aware of any such alteration as can affect the present case.

The general principle remains as it was at the time of the charter, to wit, that no person shall be twice taken in execution upon the same judgment.

The case of escape is the only exception recognized by the common law; and the reason of that exception is stated by Mr. Justice Ashhurst, in 1 T. R. 557, to be, that the defendant is not legally out of custody; and even that exception was, for a long time, denied or doubted; and even as late as 8 and 9 W. 3, (Anno 1697,) it was thought necessary to pass an act, (8 and 9 W. 3, c. 27, § 7,) authorizing the plaintiff to retake the prisoner by a new *capias*, or to sue forth any other kind of execution on the judgment, as if the body of such prisoner had never been taken.

A discharge under the insolvent law is no exception to the rule; for, the body of the debtor, once discharged by an insolvent law, from execution, cannot be lawfully taken upon a new *capias*.

The case of privilege of parliament, which is provided for by the statute of 1 Jac. c. 13, does not apply to this country.

The case of *West's Executor v. Hyland*, 3 Har. & Johns. 200, as there reported, seemed to have recognized a new exception to the general rule. The marginal note of that case is thus: "Where a *ca. sa.* is returned *cepi*, and the plaintiff does not proceed to enforce the writ by having the defendant committed, defaulting the sheriff, or having it entered 'not called,' it does not preclude the plaintiff from taking out a new *ca. sa.*"

We have been furnished with a transcript of the record of that case, from the Court of Appeals; and although every thing stated in the marginal note is true, yet the printed report of the case does not state the fact that the defendant had escaped, and that,

therefore, the court refused to quash the second *ca sa*, and discharge the defendant.

By the transcript of the record, it appears that, upon the return of the first *ca. sa.*, (which was returned *cepi*,) the sheriff of Somerset had not the defendant in court, having suffered him to go at large. That the sheriff left the court two days before the close of the session; and that, on the day after the sheriff had left the court, the defendant, for the first time, came in, but there was then no sheriff there to whom he could be committed; so that the defendant did not appear at the court, in the custody of the sheriff, as stated in the report.

This was clearly an escape; for, in the case of *Koones v. Maddox*, 2 Har. & Gill, 106, it was decided by the Court of Appeals of Maryland, "that an action of debt will lie against a sheriff, who, having arrested a defendant on a *ca. sa.*, permitted him to go at large until the return-day of the writ, although the sheriff then brought the defendant into court."

The case of *West v. Hyland*, therefore, instead of furnishing a new exception to the general rule, is a strong confirmation of it, and shows that the only exception, at common law, is the case of an escape.

No man knew the law or practice of Maryland better than Luther Martin, who had been in full practice nearly half a century, and who was the counsel of the plaintiff, in that case; and his affidavit, which was filed in the cause, upon the motion of the defendant's counsel, to set aside the second *ca. sa.*, shows that, in his opinion, the return of "*cepi*" upon the first, without further proceeding, operated as a discharge of the defendant, unless the plaintiff could show that it was a case of escape. His reply, therefore, to the motion of the defendant's counsel, was, as appears by the record, that the defendant, before the last *ca. sa.* was issued against him, and after the first had been served upon him, escaped from the custody of the said sheriff.

The fact of the escape having been proved by the affidavit of Mr. Martin and Mr. Polk, the court refused to set aside the writ, and to discharge the defendant; and the record then proceeds thus:—"And the said Lambert Hyland, being called, appears, and it being demanded of him whether he be the same person taken in execution at the suit of the said Hannah West, executrix as aforesaid, confesses that he is, and that he hath not the money to satisfy to the said Hannah West, executrix as aforesaid, the debt, damages, costs, and charges aforesaid; whereupon, on the prayer of the said Hannah West, executrix as aforesaid, by her attorneys aforesaid, the said Lambert Hyland is, by the court, now here committed to the custody of the sheriff of Somerset county aforesaid, in execution for the debt, damages, costs, and

charges aforesaid, at the suit of the said Hannah West, executrix as aforesaid, there to remain until," &c., "and the said sheriff being here present, takes charge of the said Lambert Hyland accordingly, &c."

The Court of Appeals sat at Easton, in Talbot county. The *ca. sa.* was directed to and returned by the sheriff of Somerset county.

This record is also proof of the practice in Maryland, to require the defendant who has been arrested upon a *ca. sa.* to be brought before the court upon the return day of the writ, and committed in execution as a justification of the sheriff for holding the defendant in custody after that day.

That the general rule, as modified by the statutes of 1st and 21st Jac. and 8 and 9 W. 3, with the single exception of escape, remains as it was at common law, appears in Tidd's Practice, 196, 1033, 1034, 1068, 1069, (Troubat's ed.) and 1 Saund. 35, (Williams's ed.)

That it prevails also in other States than Maryland, appears in the case of *Yates v. Van Rensselaer & Schemmerhorn*, 5 John. 364, where the court said, "Though we may say, in the language of Justice Grose, (2 East, 244,) that the attempt, on the part of the defendants, to get discharged of the debt, is scandalous, yet the rule of law is settled." And in *Freeman v. Ruston*, 4 Dall. 217, where the court observed, "The case appears so clear to us, that we do not wish another moment for consideration. The law is settled in England, that a *ca. sa.* operates as a satisfaction of the debt; as an extinguishment of the lien of the judgment. We have no other rule prescribed to us in Pennsylvania, nor can we perceive that there would be any policy or justice in departing from it."

Such, therefore, being the general principle, so long and so well established, it is incumbent upon the United States to show, either that they are not bound by the general rule, or that they are within some exception to it.

In the first place, it is said that the rule only applies to civil cases, and that this is a criminal case, and therefore not within the rule.

The answer to this objection is, that the United States are only authorized to issue a *ca. sa.* for a fine by the law of Maryland which they have adopted for this part of the district, and which, in giving the writ, expressly requires that "such proceeding should be had thereon as in cases where similar writs are issued on judgments obtained in personal suits." The United States must take it as it is given; and when they do take it, they must proceed *civiliter*, and not *criminaliter*. The nature of the proceeding is changed; and the State of Maryland, by giving the civil remedy,

has, in effect, agreed that she will so far waive any prerogative attached to her criminal jurisdiction. The United States, by adopting the same remedy, must do the same.

This point, we think, was decided by the Supreme Court of the United States, in *Ex parte Watkins*, at the last term, 7 Peters, 568, when they admitted that the United States were bound by the Maryland practice in regard to execution by *ca. sa.* in civil causes. But if the United States are bound by the general rule, it is said that the general rule is confined to the case of a discharge with the consent of the plaintiff.

This position is not supported by the authorities cited. *Blumfield's case*, 5 Co. 86, (b) is the strongest; but the authority of that case is denied in several subsequent cases; and in some, the *dicta* which appear to give some countenance to the position assumed, on the part of the United States, are expressly overruled, as has been before noticed.

There is no pretence that the defendant escaped. On the contrary, he was discharged by the Supreme Court of the United States, upon *habeas corpus*, because the marshal had not, according to the exigency of the writ, and the practice of Maryland in like cases, any authority to detain him beyond the return term of the writ, unless under a commitment by the court at the prayer of the plaintiff; and in that case the United States did not pray him in commitment. The United States might have had the full benefit of their judgment and execution, but did not avail themselves of it.

To this, however, it is objected that it was either the neglect of the marshal in not bringing in the defendant, or of the attorney of the United States in not calling on the marshal to bring him in; and that the United States are not bound by the neglect of their officers.

This objection, we think, is also answered by the judgment of the Supreme Court, in the case *Ex parte Watkins*, at the last term. For the objection was as valid then as it is now; and if the United States were not bound by the neglect of the marshal to bring in the defendant at the return of the first *ca. sa.*; and of the attorney of the United States to pray him in commitment, then the case would have stood before the Supreme Court, as a case in which the marshal had brought in the defendant at the return of the writ, and as if the attorney of the United States had prayed him in commitment; and then that court could not have discharged him on the ground they did; for the only ground, upon which he was discharged by that court, was that the United States had neglected to have the defendant brought into court at the return day of the writ, and prayed in commitment.

The same answer may be made to the supposition that the

omission to have the defendant committed was caused by the mistake of the officers of the United States as to the law or the practice of the court. The objection was as valid in the case before the Supreme Court as it is here. But if it were not so, the United States having, by taking the writ of *ca. sa.* under the law of Maryland, placed themselves, so far as the proceedings are to be carried on under that writ, upon the ground of an individual in a personal suit, are equally liable to lose the benefit of the writ by the neglect of their officers to pursue it to its full effect.

It may be proper to notice some expressions in some of the cases cited on the part of the United States, which, from their generality, may be supposed to favor the construction given to the general rule by the counsel of the United States.

It may be observed of the cases in which it is said that the taking of the body is good execution, but is not satisfaction, that they are cases where there was judgment against two or more defendants, and one of them taken in execution. In those cases, the taking of one was not satisfaction as to the others.

Such was the case, 29 H. 8, Br. Execution, pl. 132; and *Blumfield's case*, 5 Co. 86, (b); and the *Anonymous case* in Moore, 29, ca. 96; and *Cowley v. Lydcot*, 2 Bulstr. 97; and *Whiteacres v. Hawkins*, Cro. Car. 75; and *Rosser v. Welch & Kemmis*, Godbolt, 208; *Shaw v. Cutteris*, Cro. El. 850; *Williams v. Cutteris*, Cro. Jac. 136, 143; *Price v. Goodrick*, Styles, 387; and *Clark v. Clement*, 6 T. R. 525.

The language of Mr. Justice Baldwin in delivering the opinion of the Supreme Court of the United States in the case of *Tayloe v. Thompson*, 5 Peters, 370, has been cited to show, that in every case of the discharge of a defendant from execution upon a *ca. sa.*, without actual payment of the debt, or the consent of the plaintiff, he may have a new *ca. sa.*, and arrest the defendant again upon the same judgment.

The only point decided in that case, in relation to the question in this, was, that the arrest and escape of Glover upon a *ca. sa.* did not destroy the lien of the judgment upon Glover's lands; and that was the whole extent to which it was necessary, in that case, to lay down the law as to the effect of a commitment of the body in execution. The language of the opinion, however, is:—"The greatest effect which the law gives to a commitment on a *ca. sa.*, is a suspension of the other remedies on the judgment during its continuance; whenever it terminates, without the consent of the creditor, the plaintiff is restored to them all, as fully as if he had never made use of any."

Whether the negligence of the creditor, in not pursuing his remedy, whereby he lost the benefit of the arrest, would be considered as evidence of his consent to the termination of the com-

mitment, might be doubtful; but it cannot be admitted that the Court would have decided, that if the plaintiff has once had the body of his debtor in execution, and by his own negligence loses the full benefit thereof, without any fault on the part of the defendant, he may have a new *ca. sa.*, and again take the body in execution on the same judgment. Lord C. J. Hobart, in *Foster v. Jackson*, (Hob. 57,) says, "Neither can the body be taken for a time, or for part, as in a *feri facias*, but it must be totally and finally during his life." And, in p. 59, he says, that "if a *capias* be executed, that is, in law, sufficient for the whole debt, for the value of the human body cannot be estimated."

It is but just and fair, in construing the language of a judicial opinion, to consider it in reference to the point of the case, and to understand the court as not intending to extend the doctrine advanced beyond the limit necessary to support the decision. All beyond that, must be considered as *dictum*, and of no greater weight than that of the authorities by which it is supported.

The case of *Codwise v. Gelston*, 10 Johns. 517, has also been mentioned; but in that case the debtor was never charged in execution; and because he had not been so charged, Chancellor Kent decided that the surrender of him by his bail, to the sheriff, after judgment, and his release from the custody of the sheriff, by the order of the plaintiff, without taking him in execution, did not discharge the lien of the judgment upon the lands of the defendant.

These *dicta* are wholly insufficient to unsettle the long established principle of the common law, that a man shall not be twice taken in execution for the same cause.

Being of opinion that the United States, when proceeding under the adopted law of Maryland, are bound by that principle; and that, in the present case, they do not come within any known and established exception to that rule; and it being also apparent that the defendant has been twice taken in execution upon the same judgment, and is now held in custody under the second execution, without any fault on his part that can deprive him of the benefit of the rule, we deem it our duty to order him to be discharged.

This opinion renders it unnecessary to express any opinion upon the other two points made in the argument.

The motion of the Attorney of the United States to commit the defendant upon these writs is overruled, and the writs are ordered to be quashed, and the defendant to be discharged from the custody of the marshal. (See also *Franklin v. Thomas*, 3 Merivale, 225.)

THE UNITED STATES, for the use of Margaret Beall, v. WILLIAM S. NICHOLS.

A guardian appointed by the Orphans' Court for the county of Washington, D. C., is liable to account there for money received by him for his ward in Maryland.

A guardian, whose authority is revoked, is bound by his bond to pay over the money in his hands to the person appointed by the Orphans' Court to receive it, although the person so appointed had not given bond as guardian.

DEBT against a surety in a guardian's bond.

The condition of the bond was that the guardian should faithfully account with the Orphans' Court as directed by law; and should "also deliver up the said property to the order of the said court, or the directions of law," &c.

The declaration averred two breaches of the condition of the bond: 1. By not paying a balance in his hands of \$78.87 to David Butler, according to the direction of the Orphans' Court; the said David Butler "being" appointed guardian in the place of John H. Beall, whose letters of guardianship were revoked. 2. By not paying to the said David Butler, according to the directions of the Orphans' Court, \$150 which the said John H. Beall had received for rents of the orphan's real estate in Maryland.

The pleadings resulted in a demurrer, the principal questions in which were, whether the guardian was bound to account here, for money received in Maryland; and whether the Orphans' Court could lawfully order the money to be paid over to the new guardian before he had given bond for the faithful discharge of his duty.

Messrs. Key and Dunlop, for the defendant, contended that the defendant, who is a surety, is only liable for such property as the guardian here had a right to collect; and that he had no right to collect the effects of the ward in Maryland; and that, although a guardian may be liable in an action for money had and received, yet it is only because he has received it; and he is only liable as any other person would be, who has received the money of the ward. That the person from whom Beall received the money in Maryland was not justifiable in paying it to Beall, and is still liable for the same.

That the surety who is about to sign the bond, considers the amount of property which the guardian would have a right to receive, and ought not to be made liable for more. They cited the Act of Maryland of 1798, c. 101; c. 12, §§ 1 and 4; *Williams v. Storrs*, 6 Johns. Ch. Rep. 353; *Morsell v. Dickey*, 1 Johns. Ch. Rep. 153; and *Genet v. Talbot*, 1 Johns. Ch. Rep. 3.

Mr. Hellen, contra, cited *Raborg v. Hammond*, 2 Har. & Gill, 49.

Chesapeake and Ohio Canal Company v. Robertson.

The COURT (THRUSTON, J., absent,) was of opinion that the pleas were bad, and said, (among other things,)

The first plea admits the receipt of the money, and the order to pay it over; but denies that it was money for which the said John H. Beall was liable to account as guardian. The Court, however, is of opinion that, although the money came from the funds existing out of the District of Columbia, yet, as it was received by him under color of his authority as guardian, he is bound to account for it as guardian. For if a stranger receive the rents and profits of an infant's estate, he may charge him and call him to account as guardian. (Bac. Ab., Guardian, I.; 1 Rol. Ab. 661; Cro. Car. 221; *Yellop v. Holworthy*, 1 Equity, Ca. Ab. 7, Ca. 10; *Newburgh v. Bickerstaffe*, 1 Vern. 295; *Falkland v. Bertie*, 2 Vern. 342.) And his bond covers all that he is bound to account for as guardian.

The second plea is, that at the time the order was made to pay the money over to Butler, he had not given bond as guardian, and, therefore, was not lawful guardian to receive the money.

This plea assumes that the Orphans' Court had no authority to order the guardian to pay the money over to a stranger, and that such an order is absolutely void, and, therefore, it was no breach of the bond to disobey the order.

But it does not appear that the Orphans' Court might not lawfully order the money to be paid over to Butler, although he had not been appointed guardian; or had not given bond. He might have been appointed a receiver for safe keeping. The declaration does not aver that Butler had been appointed guardian before the order was made, or before the money was to be paid; it merely describes Butler as "being appointed guardian."

But if it were necessary that Butler should give bond and security before he could lawfully receive the money, the order to pay it over would not be illegal, as no time of payment was specified in the order stated in the declaration; and if previous security were necessary, the order would be considered as conditional, and to become absolute upon the security being given. It does not, therefore, necessarily follow that the order was void because the security was not given until after the date of the order.

The Court is of opinion that all the pleas are insufficient.

CHESAPEAKE AND OHIO CANAL COMPANY v. HENRY B. ROBERTSON.

The original subscribers to the Chesapeake and Ohio Canal Company, are bound by the alterations of the charter made by subsequent acts of legislation with the consent of the corporation.

THIS was a motion by *Mr. C. Cox* for the Chesapeake and Ohio Canal Company, for judgment for an unpaid instalment under

Semmes v. Sprigg.

the fifth section of the original charter granted by Virginia on the 27th of January, 1824.

Mr. Key, for the defendant.

The original subscribers are not bound by the alterations made by subsequent acts of legislation, although made with the consent of the corporation.

The company cannot consent to any alterations that can bind the original subscribers.

The subscriptions were made under the Act of Virginia of the 27th of January, 1824; the Act of Maryland was passed at the December session of 1824, and the Act of Congress on the 3d of March, 1825.

Material alterations have been made by the Act of Maryland of the 10th of March, 1827; the Maryland Act of December, 1826, and by the Act of Virginia of the 25th of January, 1828. (*Quære*, February 26, 1828?)

These amendments make a new charter. The company afterwards assented to these alterations, but the old subscribers were not members of the company which so assented.

Mr. Key cited the following authorities. The case of *Dartmouth College*, 4 Wheat. 590; *Head v. The Providence Ins. Co.* 2 Cranch, 127; *Gozler v. Georgetown*, 6 Wheat. 593; *Terrett v. Taylor*, 9 Cranch, 43; *Rex v. Passmore*, 3 T. R. 240; *Wales v. Stetson*, 2 Mass. 143; *Ellis v. Marshall*, 2 Mass. 269; *Bagg's case*, 1 Rol. Rep. 224; *Domat*, 153; *Poth. on Obl.* 565; *Korn v. Wisemiller*, 6 Cranch, 192; 3 Bac. Ab. 16; *Kyd on Corp.* 401; *Currie v. Mutual Assurance Society*, 4 Hen. & Mun. 315.

Mr. Cox referred to *Angell & Ames on Corporations*.

The company was first organized on the 20th of June, 1828. All those alterations had then been made. *Mr. Robertson* has paid all but the twelfth and following instalments. At a general meeting of the company on the 3d of July, 1828, *Mr. Key* moved that the company assent to the alterations, and the motion was carried unanimously, the defendant being present, or represented, at the meeting.

The COURT (*nem con.*) overruled the objections, and ordered the judgment to be entered up, with costs.

SEMMEs v. SPRIGG.

REPLEVIN. The COURT (THRUSTON, J., absent,) decided that the appraisement, made at the time of levying the distress, is *prima facie* evidence of the value of the goods distrained.

Messrs. Turner and Redin, for the plaintiff.

Messrs. Key and Dunlop, for the defendant.

SMITH AND WIFE v. CLARKE.

A due-bill made to the wife during the coverture, and for a consideration accruing during the coverture, is not admissible evidence to support a declaration which avers that the due-bill was made *dum sola*.

THE declaration stated that the due-bill, which was made to the wife, was made to her *dum sola*. The due-bill offered in evidence was given to her after the marriage, and during the coverture, for a consideration accruing during the coverture.

The defendant objected to the evidence for the variance, and the objection was sustained by the Court. (THRUSTON, J., absent.)

COPE v. HUNTT.

The indorser of a promissory note is discharged by the plaintiff's giving the maker time to pay by instalments.

ASSUMPSIT, against the indorser of Houston's note for \$500, due July 7, 1829.

Mr. R. S. Coxe, for the defendant, offered evidence of a subsequent agreement between the plaintiff and the maker of the note, that the latter should assign ten dollars a month of his pay as a clerk in the Treasury Department in payment of the note; and that the plaintiff should wait for payment in that manner. That Houston continued to make such payments according to the agreement until April, 1831; and that this agreement was made without the knowledge of Hunt, the indorser. *Bank of United States v. Hatch*, 6 Peters, 250; 5 Vin. Ab. 527, pl. 17; Bridgman's Digest.

Mr. J. Dunlop, *contrà*.

There was no new consideration. It was a mere promise to wait. *McLemore v. Powell*, 12 Wheat. 554, 556.

Whereupon, the COURT, (MORSELL, J., *contrà*,) instructed the jury, at the prayer of the defendant's counsel, that such an agreement, if proved, discharged the indorser, (the defendant,) from his liability.

Verdict for the plaintiff; but,

The COURT being of opinion that the verdict was against the evidence, or the law, granted a new trial. (MORSELL, J., *contrà*.)

Barnard & Morton, Petitioners.

ROBERT BARNARD and WILLIAM MORTON, Petitioners for a Private Way, under the Act of Maryland, 1785, c. 49.

The Act of Maryland of 1785, c. 49, respecting private roads or ways, is not repugnant to the Constitution of the United States, and is in force in the county of Washington, D. C.

THE surveyor having laid out a way according to a former order of the Court, and having made his report, and a rule having been served on the possessors of the land through which, &c., to show cause, &c.

Mr. R. S. Coxe, for Mr. Mackall, objected.

The Act of Maryland of 1785, c. 49, was passed before the amendment of the Constitution of the United States, which forbids the taking of private property for public use without just compensation. The Act of 1785, does not provide for just compensation, and being repugnant to the Constitution of the United States, is void.

But this land is not to be taken for public use. It is to be a private way, for private use; and it is not competent for any legislature to take the property of one man and give it to another, even with compensation. By that act, the Court, and not the jury is to ascertain the compensation; which is unconstitutional. *Van Horn v. Dorrance*, 2 Dall. 307, 310, 312. Besides, the petitioners have not made out a case of necessity. The old way cannot now be lawfully stopped. It has been open and used for forty years, and a grant may now be presumed. *Aspidall v. Brown*, 3 T. R. 265; 2 Dane's Ab. 256, ch. 79, art. 4; *Alban v. Brounsall*, Yelv. 163; *Chichester v. Lethbridge*, Willes's Rep. 71; *Reignolds v. Edwards*, Willes's Rep. 282; *Gayetty v. Bethune*, 14 Mass. 49; 3 Dane's Ab. 250, art. 13; *Campbell v. Wilson*, 3 East, 294; *Dexter v. Hazen*, 10 Johns. 246; 3 Dane, 252, art. 16, 17; 2 Johns. 424; *Cincinnati v. White*, 6 Pet. 431.

Mr. Redin, for the petitioners, referred to the following Act of Maryland respecting streets in Georgetown, namely, 1797, c. 56, § 6, and the Acts of Congress 3 March, 1805, § 12, [2 Stat. at Large, 334,] and 3 March, 1809, § 4, [2 Stat. at Large, 538.] He also cited *Greenwood v. Stoner*, 3 Har. & Johns. 435; *Howton v. Fearson*, 8 T. R. 50; *Dutton v. Taylor*, 2 Lutw. 1487; *Clark v. Cogge*, Cro. Jac. 170; *Staple v. Heyden*, 6 Mod. 3 and 4; 1 Roll. Ab. 936, pl. 10.

Mr. Key, on the same side. The constitutional objection has been overruled in the cases of the *Chesapeake and Ohio Canal Company*.

The Act of 1785 has always been acted upon in Maryland.

Holtzman v. Franklin Insurance Company.

The COURT (*nem. con.*) confirmed the report of the surveyor, and allowed \$130, for compensation, namely, $2\frac{1}{2}$ acres at \$30, and \$55 for fencing.

THOMAS HOLTZMAN v. FRANKLIN INSURANCE COMPANY.

Upon a policy of insurance upon certain goods whilst they should be and remain in a certain building, against any loss or damage which should happen by, or by means of fire, the underwriters are liable for loss and damage sustained by the removal of the goods in case of imminent danger from fire.

THE policy recited that whereas the assured had paid the premium for insurance of \$3,000, on a stock of groceries in a certain house therein particularly described "from loss or damage by fire whilst the said stock of groceries shall be and remain in the building aforesaid." "Now know all men by these presents, that in consideration thereof, the capital stock," &c., "of the said corporation shall be subject to pay to" the assured, &c., "any loss or damage which shall or may happen by, or by means of fire to the said stock of groceries in trade."

At March term, 1832, the COURT (MORSELL, J., *contrà*,) refused to give the following instruction, prayed by Mr. Key, for the plaintiff.

"That if the jury should be satisfied, by the evidence, that the goods insured were in such danger of destruction by fire as would have induced every prudent man to remove them to prevent such loss; and the plaintiff, for the purpose of saving them from such danger, had them removed from the building with all the care that could be applied to such removal; and that the goods were so removed, and that, in such removal, and before they could by any possible means be brought back again, they were lost and injured, and that no human care could prevent such loss or injury; then such loss or injury was a loss occasioned by the removal; and the removal was occasioned by the danger of fire; and the loss or injury was therefore occasioned by the peril insured against."

The COURT also, (MORSELL, J., *contrà*,) at the same term, at the prayer of the defendant's counsel, "instructed the jury, that if they should believe, from the said evidence, that the said goods of the plaintiff alleged to be destroyed or damaged were so destroyed or damaged after they were in fact removed as therein stated from the premises mentioned in the policy; and that the said goods were not destroyed or injured by fire; then the plaintiff is not entitled to recover in this action."

Holtzman v. Franklin Insurance Company.

"And further, that if, from the evidence aforesaid, the jury shall believe that the loss mentioned in the said evidence to be sustained, was caused immediately and directly by the moving of the goods of plaintiff covered by the policy of insurance as stated in the said evidence, and that the said goods were not destroyed or injured by fire, the plaintiff is not entitled to recover in this action."

The jury found a verdict for the defendants.

Mr. Marbury, moved for a new trial on the ground of misinstruction of the jury by the Court; which motion was argued in part at the same term, by *Mr. Marbury*, for the plaintiff, and by *Mr. R. S. Coxe* and *Mr. Bradley*, for the defendants.

Mr. Marbury, cited *Austen v. Drew*, 6 Taunt. 436; *Wells v. Boston Insurance Company*, 6 Pick. 182; *Marshall on Ins.* 251; 2 Bl. Com. 380; *Cullen v. Butler*, 5 Maul. & S. 463; *Marshall*, 249, 614; *Bondrett Hentigg*, 1 Holt, 149; *Wilson v. Royal Ex. S. C.* 2 Camp. 623; *Austin v. Drew*, 4 Camp. 360; *Amory v. Jones*, 6 Mass. 318; *Lee v. Gray*, 7 Mass. 349; *Corp. v. United Insurance Co.* 8 Johns. 277; *Saltus v. United Insurance Co.* 15 Johns. 530; *Craig v. United Insurance Co.* 6 Johns. 250; 11 Petersdorff, 193, n.; *Patrick v. Commercial Insurance Co.* 11 Johns. 9.

Mr. Coxe, for the defendants, cited *Marshall*, 346, 485, 554, 716.

Mr. Bradley, for the defendants, cited *Jumel v. Marine Insurance Company*, 7 Johns. 412; *Gardel v. Columbia Insurance Company*, 7 Johns. 514; *Gardner v. Smith*, 1 Johns. Cases, 141; 3 Kent, Corn. 375; *Green v. Elmsley*, 2 Peake N. P. Cases, 212; *Martin v. Del. Ins. Co.*, 2 Wash. C. C. Rep. 254; *Mason v. Ship Blaireau*, 2 Cranch, 257.

Mr. Bradley had not finished his argument when the Court adjourned, and the cause was continued to the present term, when the COURT (CRANCH, C. J., absent,) granted a new trial without costs.

Upon the new trial, *Mr. Coxe*, for the defendants, moved the Court to instruct the jury "that if they should believe from the evidence that the said goods of the plaintiff alleged to be so destroyed and damaged, were so destroyed and damaged after they had been in fact removed, as therein stated, from the premises mentioned in the policy; and that the said goods were not so destroyed or injured by fire, then the plaintiff is not entitled to recover in this action."

Which instruction, the COURT (CRANCH, C. J., *contra*,) refused to give.

Mr. Marbury, for the plaintiff, then prayed the Court to instruct the jury, "that if they should believe from the evidence afore-

Fowler v. MacDonald.

said, that the loss and injury to the goods happened in consequence of their removal from the house mentioned in the policy, without the neglect or fault of the plaintiff; and that such removal was occasioned by a fire in the neighborhood of the said house, by which the said goods were exposed to such present and imminent danger that a prudent man would not have permitted them to remain in the said house; and that as much care was used in the removal as a prudent man would have used in relation to his own goods similarly situated; then the said removal was justifiable, and the loss and injury thereby happening, covered by the policy, and the plaintiff, therefore, entitled to recover."

Mr. Marbury, in support of his prayer, offered to cite many cases which he did not read.

Mr. Coxe said he had some strong cases on the other side. But the Court would not hear further argument, and gave the instruction as prayed by *Mr. Marbury*.

CRANCH, C. J., said he wished for time to consider, or at least to look at the cases cited, as, in consequence of the former argument remaining unfinished at the last term, he had not looked at them in the vacation. He could not, therefore, join in giving the instruction.

Verdict for plaintiff, \$425.91.

C. S. FOWLER v. STEPHEN MACDONALD.

A written promise, absolutely to pay the note of a third person, written at the foot of the note, is an original undertaking, and need not express the consideration.

ASSUMPSIT, on the following note of William Duncan:

"Washington, January 22d, 1831. Four days after date I promise to pay C. S. Fowler, fifty dollars, for value received.

"WM. DUNCAN."

"I will pay the above at maturity. Jan. 22d, 1831.

"S. MACDONALD."

Mr. Hall, for the plaintiff, cited Story's Chitty on Bills, 122.

Mr. Fendall, for the defendant. This is an agreement to pay the debt of another, and although it is in writing, yet the consideration is not stated. *Wayne v. Warlters*, 5 East; 11; *Fell on Guaranty*, 318, 401; *Lynn v. Lambe*, and *Eggarton v. Matthews*; *Sanders v. Wakefield*, 4 B. & A. 595; *McComber v. Clarke*, in this Court at December term, 1826, (3 Cranch, C. C. 6); *Sloan v. Wilson*, 4 Har. & Johns. 322.

Mr. Hall, in reply, cited *Fell on Guaranty*, 45, (note); *Pack-*

Dobbins & Evans v. Bradley.

ard v. Richardson, 17 Mass. 122, *contra*; *Fell*, 46, (note); *Leonard v. Vredenburg*, 8 Johns. 29; 2 Wheat. Selwyn, N. P. 63.

The case was submitted by the counsel.

The COURT (*nem. con.*) was of opinion that this was an original undertaking, and that the consideration need not be in writing.

Judgment for the plaintiff.

DOBBINS & EVANS v. W. A. BRADLEY.

A guaranty of paper payable at the Branch Bank at Washington, does not cover a note dated in New York and not made payable at that bank.

When credit is given upon a guaranty, notice thereof should be given to the guarantor in a reasonable time thereafter. When six months' credit was given upon the guaranty, five days notice was held to be too short.

ASSUMPSIT, on the defendant's letter of guaranty dated in Washington, D. C., June 27th, 1827, in these words: "I hereby engage to guarantee the payment of his (Mr. Andrew Smith's) paper payable at the Branch Bank here, not exceeding \$5,000, at such dates as he may find expedient."

On the 1st of October, 1828, *Mr. Coxe*, the plaintiff's counsel, wrote a letter to Mr. Bradley, informing him that the note of Mr. Smith, dated April 3d, 1828, at six months, for \$3,344.57, would become due on the 6th of October, 1828; and that it was given for goods had upon his guaranty.

The note was not made payable at the Branch Bank at Washington. It is dated at "New York, April 3d, 1828. Six months after date I promise to pay to the order of Dobbins and Evans, thirty-three hundred and forty-four dollars and fifty-seven cents, value received.

ANDREW SMITH.

Indorsed, "DOBBINS & EVANS."

Mr. Jones, for the defendant, prayed the Court to instruct the jury, that upon the plaintiff's evidence he cannot recover in this action.

This note is a New York contract, and carries seven per cent. interest. The guaranty was of the paper of Mr. Smith, "payable at the Branch Bank here;" which is a very different contract from a sale of goods in New York. Notice of the acceptance of the guaranty was not given until five days before the note became payable, although the goods were furnished and the note given in April, six months before the notice. It should have been given immediately, or as soon after the credit given as it could conveniently be given. *Douglass v. Reynolds*, 7 Peters, 113; *Clarke v. Russel*, 7 Cranch, 69; *Cremer v. Higginson*, 1 Mass. 324, 340;

United States v. Erskine.

Fell on Guaranty, 128; *Norton v. Eastman*, 4 Greenl. 521; *Ludlow v. Simond*, 2 Caines's Ca. in Error, 1, 33, 44, 56, 63; *Lanusse v. Barker*, 3 Wheat. 101; *Purcell v. Somersett*, 4 Taunt. 593.

The letter from Mr. Bradley to Mr. Smith inclosing the letter of guaranty, was shown to the plaintiffs at the same time, as appears by Mr. Coxe's letter to Mr. Bradley. The letter to Mr. Smith limits the guaranty to Mr. Smith's fall supply of goods.

Mr. Coxe and *Mr. Key*, for the plaintiffs, contended that this was a general, absolute, and continuing guaranty, and that notice is only necessary where it is a mere offer to guarantee. There it must be accepted, and notice given before it can amount to a contract.

This note was payable at the Branch Bank, at Washington, for it was payable anywhere, and was placed in that bank for collection before it was due. The contract was not that the paper should appear upon its face to be payable at that bank; it is sufficient that it was placed there for collection.

They cited *Fell on Guaranty*, 59, 129; *Duvall v. Trask*, 12 Mass. 154; *Lawrason v. Mason*, 3 Cranch, 492; *Boston v. Bennett*, 3 Camp. 220; *Ludlow v. Simond*, 2 Caines's Ca. in Error; *Fell*, 123, 143; *Lanusse v. Barker*, 3 Wheat. 128; *Clarke v. Russell*, 7 Cranch, 69; *Simmons v. Keating*, 2 Starkie Rep. 370.

The COURT (THRUSTON, J., not sitting in this cause, being connected with the defendant,) stopped the counsel of the defendant, in reply, and

CRANCH, C. J., said the case seemed very clear to the Court on both points.

1. The note is not a paper made payable at the Branch Bank at Washington, and, therefore, not within the terms of the guaranty.

2. That the guaranty is neither absolute nor definite, and, therefore, notice ought to have been given in a reasonable time after the credit was given.

The plaintiffs had leave to amend their declaration, but afterwards dismissed their suit.

 UNITED STATES v. WILLIAM ERSKINE.

Upon an indictment for perjury in this Court it is not necessary to produce a copy of the record of this Court in the cause in which the perjury was committed. The Court is presumed to know its own record. The record exists although not reduced to writing in full; and the record is what it ought to be when correctly extended from the minutes.

It is only necessary to prove so much of the testimony of the witness as relates to the particular fact on which the perjury is assigned. After conviction of perjury, if the

defendant move in arrest of judgment, and then forfeit his recognizance, the Court will not give its opinion until the defendant appears in person.

INDICTMENT for perjury committed on the trial of John Ryan, at the last term of this Court, by testifying that Evelina Ridgway, a witness in that cause, was a common drunkard.

Mr. Key (District Attorney) offered the record of this Court to show that there was such a prosecution against Ryan; and, as evidence of the record, produced the docket entries and minutes of the Court.

Mr. Marbury, for the defendant, objected that the docket entries and minutes are not the record, and cited *Archbold*, Cr. L. 318; *Queen v. Scott*, 6 Mod. 168. The minutes of another court are not the record. *Archbold*, 81. The whole record must be given in evidence. 1 *Harrison's Dig.* 408; *Rex v. Bellamy*, 1 R. & M. 171; *Harrison v. Rowan*, 4 Wash. C. C. Rep. 202; 1 *Murphy*, N. C. Rep. 156. The style of the court must be truly set forth in the indictment.

The COURT (*THRUSTON*, J., absent,) overruled the objection, and said, that, it being a record of this Court, no copy of the record is necessary to be produced. The Court itself needs not to be judicially informed of its record; it is presumed to know its own record, and the minutes and docket entries are mere memoranda to refresh the recollection of the Court and the clerk, and by which he is to make up the roll. The record exists although not reduced to writing in full; and the record is what it ought to be when correctly extended from the minutes. (See *Banks's Executors v. Triggs's Executors*, 2 Wash. 215.)

Mr. Marbury contended that it was incumbent on the United States to prove all that the witness testified on that trial, and cited *The King v. Jones*, Peake, N. P. 38, and *Rex v. Dowling*, Peake, N. P. 171.

The COURT, however, said, (*nem. con.*) that the law was correctly laid down by *Starkie* on Ev. part iv. p. 1142, who says, "It seems, therefore, that, at most, the rule amounts to this, that all the evidence given by the defendant in reference to the particular fact on which perjury is assigned, ought to be proved. And the rule, even to this effect, appears to be a doubtful one; for when it has once been proved that particular facts, positively and deliberately sworn to by the defendant in any part of his evidence, were falsely sworn to, it seems, in principle, to be incumbent on him to prove, if he can, that, in other parts of the testimony, he explained or qualified that which he had so sworn.

Verdict, guilty.

Mr. Marbury, for the defendant, moved in arrest of judgment, and the motion was argued by him and *Mr. Key*; but the de-

feudant forfeited his recognizance, and the Court refused to give any opinion upon the motion, unless the defendant should be present.

UNITED STATES v. JOHN W. PROUT.

Comparison of hands is not evidence to prove forgery. Witnesses skilled in handwriting will not be permitted to give their opinion, upon inspection of the papers, whether the forgery was done by the defendant.

A count under the Maryland Act, 1796, c. 67, § 19, for giving a pass to a slave, is bad if it do not aver that the master or owner was thereby deprived of the service of his slave. But upon conviction of a free person on an indictment under the tenth section of the Maryland Act of 1751, c. 14, for enticing a slave to run away, and who actually ran away, the offender may be fined under the nineteenth section of the Maryland Act of 1796, c. 67, without an averment of loss of service.

THE defendant was tried, upon two indictments, by the same jury.

The first indictment was for forging a certificate of freedom under the seal of this Court.

Upon the trial, *Mr. Key* (United States Attorney) offered to show to the jury, the prisoner's signature, written in the presence of the marshal, and to allow them to compare it with the handwriting of the forged certificate, and cited 4 Starkie on Ev. 570.

But the COURT (*nem. con.*) rejected the evidence.

Mr. Key then offered to submit the papers to a witness skilled in handwriting, and to give the opinion of the witness in evidence, whether the paper was forged by the prisoner.

But the COURT (*nem. con.*) refused; and upon that indictment the jury found the prisoner not guilty.

The second indictment had two counts. The second count in that indictment was under the Maryland Act of 1796, c. 67, § 19, for giving a pass to the slave of one Lucy Miller, without averring that she thereby was deprived of the service of her said slave.

The COURT said that this count was insufficient, and instructed the jury that the United States could not recover judgment upon it; and the jury found the prisoner not guilty on that count.

The first count of the second indictment was upon the Maryland Act of 1751, c. 14, § 10, by which it is enacted, "that if any free person shall entice and persuade any slave within this province, to run away, and who shall actually run away, from the master, owner, or overseer, and be convicted thereof by confession, or verdict of a jury upon an indictment or information, he shall forfeit and pay the full value of such slave, to the master or owner of such slave, to be levied by execution on the goods, chattels, lands, and tenements of the offender, and in case of inability

to pay the same, shall suffer one year's imprisonment without bail of mainprise."

This first count of the second indictment charged that the defendant, "being a free person, did, on," &c., "at," &c., "entice and persuade a certain slave named Joseph Dozier, the property of Lucy R. Miller, of Washington county, the said slave then and there being in the said county, to run away, which said slave did then and there actually run away from his said mistress and owner, against the form of the statute," &c.

Upon this first count of the second indictment the jury found the prisoner guilty; and his counsel, *Mr. W. L. Brent*, moved the Court in arrest of judgment as to any fine or corporal punishment. The conviction only gives the owner a right to recover the value of the slave, by a new action founded upon the verdict.

Mr. Key, contra, contended that the Court must hear evidence of the value, and then render judgment according to the statute, for the value thus ascertained by the Court. 11 Petersdorff, 718.

Mr. Miller, being sworn to testify to the Court, stated the value of the slave to be \$600. The slave, however, has been recovered by the owner, and the expense of recovering, and loss of service, were much less than the value of the slave.

CRANCH, C. J., after a considerable investigation of cases analogous to this, suggested the following judgment. (See the Maryland Act of 1751, c. 14, § 10.)

Whereupon, all and singular the premises being by the Court here seen and understood; and it further appearing to the Court here that the said slave in the said first count in the said indictment mentioned, is of the full value of six hundred dollars current money of the United States: It is considered that the said United States recover against the said John W. Prout the sum of six hundred dollars, and the further sum of for their costs, &c., the said sum of six hundred dollars being the full value of the said slave, to be paid to the said Lucy R. Miller in the said first count in the said indictment mentioned; she, the said Lucy R. Miller, being the mistress and owner of the said slave. The said sum of six hundred dollars to be levied by execution on the goods, chattels, lands, and tenements of the said John W. Prout; and in case of his inability to pay the same, then that the said John W. Prout shall suffer one year's imprisonment from this 4th day of May, 1833, without bail or mainprise.

See Co. Ent. 368, b; Rastell's Ent. 218 to 220, Tit. Detinue, Judgment, 5, 6, 8, 9, 10, 11, 12, 13, 16, 17, 18, Chattel, Detinue of Chattels; Rastell's Ent. 211, b, Execution in Detinue, 216, b; Execution, 8.

The COURT, however, (CRANCH, C. J., *contra*,) gave judgment for a simple fine of \$50, under the Act of 1796, c. 67, § 19.

 United States v. Johnson.

CRANCH, C. J., was of opinion that the prisoner could not be punished under that act, because there was no averment of loss of service; which averment the Court, on the trial, had deemed so necessary that they had instructed the jury that the United States could not recover upon the count founded thereon.

UNITED STATES v. ABRAHAM JOHNSON.

In an indictment under the Maryland law of 1796, c. 67, § 19, for assisting by advice, the transporting of a slave, whereby his owner was deprived of the service of his slave, it is not necessary to state what the advice was, nor how it assisted; nor is it necessary to state a criminal intent; nor that the accused knew he was a slave and intended to run away.

THE indictment, which was founded on the Maryland Act of 1796, c. 67, § 19, charged that the defendant did, on the 19th of April, 1833, "assist the transporting of a certain slave named Joseph Dozier, the property of Lucy R. Miller, of Washington county aforesaid, from the said county and district, by advice, and by conveying said slave in a gig from said county and district to the city of Baltimore, in the State of Maryland, then and there, thereby depriving the said Lucy Miller, the owner of said slave, of the service of her said slave, against the form of the statute," &c.

The jury having found the defendant guilty, his counsel, *Mr. Jones*, moved, in arrest of judgment, —

1st. That the indictment is vague and uncertain in not stating what the advice was; nor the nature of it, by which the defendant assisted, &c., nor how the advice did assist.

2d. In not charging a criminal intent; nor that the defendant knew that Dozier was a slave, or intended to run away.

Mr. Key, contra. The indictment need not aver a knowledge or intent not mentioned in the description of the offence in the statute. *King v. Salisbury*, 4 T. R. 457.

Mr. Jones, in reply. It is not sufficient to state the offence in the vague terms of the statute. The act must appear to have been unlawfully done. If the statute be taken literally, a man may be punished for giving a pass to his own slave. 1 Chitty, 231.

But the COURT (CRANCH, C. J., doubting,) overruled the motion, as well as the motion for a new trial; and fined the defendant \$50.

 United States v. M'Carthy.

HALLIHAN v. CORPORATION OF WASHINGTON.

The plaintiff who has completed the work according to his sealed contract, may, in assumpsit recover the balance due to him, although he had covenanted to receive corporation stock in payment, and had not demanded payment in stock, before bringing his action.

THE plaintiff's cause of action was for work and labor done under a contract made by a commissioner, (duly authorized to contract,) under the private seal of the commissioner, but in the name of the corporation; by which the plaintiff bound himself to do certain work at certain prices, and to receive payment in the stock of the corporation; but it contained no obligation on the part of the corporation to pay in stock.

The declaration had only the common money counts in assumpsit.

Mr. R. S. Coxe, for the defendants, objected to the contract being given in evidence; contending that the declaration should have been in covenant, on the sealed contract.

Mr. Key and Mr. Bradley, *contrà*.

The COURT (*nem. con.*, but THRUSTON, J., doubting,) admitted the evidence and told the jury, that if they should be satisfied by the evidence that the plaintiff had performed the contract on his part, he had a right to recover in this action for the balance due to him, although there was no evidence of a demand or tender of stock.

 UNITED STATES v. LEWIS M'CARTHY.

In an indictment upon the Act of Congress of the 2d of March, 1831, § 11, for uttering a forged check, it is not necessary to aver that the uttering was "to the prejudice of the right of any other person;" nor that the check was "a paper writing or printed paper." That act was not intended to alter the description of the offence of forgery as defined in the common law, or statute law of Maryland, but to designate the punishment, however the offence may be described in those laws. And although certain kinds of forgery may by those laws be made felony, they are punishable under the said 11th section of the Act of 2d of March, 1831, usually called the Penitentiary Act of the District of Columbia.

THE defendant was convicted on the 2d count of the indictment, for "feloniously" uttering as true, a forged "check, on the Bank of Maryland, which is as follows: that is to say,

"No. Bank of Maryland.

"Pay to Wm. C. Campbell or bearer, the sum of one hundred dollars and cents.

"\$100, dollars, cents. SAMUEL H. WILLIAMS.

with intent to defraud the said Lewis Fauzie, (he the said M'Carthy at the time he so uttered and published the last mentioned false, forged, and counterfeited check as aforesaid, then

and there well knowing the same to be false, forged, and counterfeited,) against the form of the statute," &c.

Mr. W. L. Brent, for the defendant, moved, in arrest of judgment, —

1. That the indictment does not charge that the uttering was "to the prejudice of the right of any other person," &c.

2. It does not charge that the check was "a paper writing or printed paper."

The 11th section of the Penitentiary Act of the 2d of March, 1831, says, "that every person duly convicted of having uttered as true, any such falsely made, altered, forged, or counterfeited paper writing or printed paper, to the prejudice of the right of any other person, body politic," &c., "knowing the same to be falsely made," &c., "with intent to defraud such person, body politic," &c., "shall be sentenced," &c.

The word feloniously is not used in the description of the offence.

The first section of the act, which enumerates the offences punishable by imprisonment and labor in the penitentiary, uses the word "forgery" alone to describe the offence.

This indictment, being for felony, is not good under the Penitentiary Act, which makes the offence only a misdemeanor; and under an indictment for felony the defendant cannot be convicted of a misdemeanor; nor can the Court render judgment, as for a misdemeanor, upon a verdict finding the defendant guilty of felony. 1 Chitty, Cr. L. 281, 282; 2 Chitty, 4; 3 Chitty, 1022, 1041.

Mr. Key, United States Attorney, *contrà*. The indictment is good upon both statutes. The Penitentiary Act describes the common-law offence exactly as it is described by Blackstone, 4 Com. 247, who says, "it may, with us, be defined, at common law, to be the fraudulent making or alteration of a writing, to the prejudice of another man's right.

The act intended therefore to punish the common-law offence, and the indictment well describes the common-law offence; and that is all that is necessary. If the act be done with intent to defraud a person, it is done to the prejudice of the right of that person; and both averments are not necessary. It is only necessary to aver matter of substance. *Commonwealth v. Carey*, 2 Pick. 47; and it is expressly stated in the books that it is not necessary to constitute forgery, that any person should have been actually injured or defrauded. The words, "to the prejudice of the right" of a person, mean only with intent to injure that person.

2. It is not necessary, under the Penitentiary Act, to state that a check is a paper writing. The word "check," describes a cer-

tain species of paper writing, and is equivalent to an averment of all the particulars which constitute the definition of the word.

But the indictment is good under the Act of Maryland, 1799, c. 75, which makes it felony, knowingly to utter as true, a false draft or order for the payment of money; for a check is a draft.

Or by rejecting the words "feloniously" and "contrary to the form of the statute," &c., it will be a good indictment at common law. *Commonwealth v. Hoxey*, 16 Mass. R. 385.

It is not necessary to follow the words of the statute in the indictment. 2 East, Cr. L. 986, 987, 996; *Commonwealth v. Richards*, 1 Mass. Rep. 337; *Brown v. Commonwealth*, 8 Mass. Rep. '59; *People v. Holbrook*, 13 Johns. 90.; *Ross v. Bruce*, 1 Day, 103.

The COURT (CRANCH, C. J., *contra*,) overruled the motion in arrest of judgment, and decided that the prisoner should be punished under the 11th section of the Penitentiary Act of March 2, 1831. [4 Stat. at Large, 448.]

MORSELL, J., cited the Maryland laws of 1790, c. 5, and 1793, c. 35, § 2, to show that a check is known as a description of paper, or security; and the Maryland Act of 1797, c. 96, which punishes forgery of a check on a bank chartered by the United States, or by a particular State; and 1799, c. 75, § 2, which punishes the forgery of any draft, warrant, or order for the payment of money or delivery of goods, &c., and thought the indictment good as for a felony under the Acts of Maryland of 1797, and 1799; and that the Penitentiary Act only altered the punishment without altering either the common law or the statutable definition of the offence; but that, however, the offence may be described in the statute of Maryland, and however it may be described in the 11th section of the Penitentiary Act, if the indictment describes an offence under the Maryland Act, the judgment may be rendered under the Penitentiary Act, although it requires it to be the uttering of "a paper writing, or printed paper," forged, "to the prejudice of the right of some other person, body politic, or voluntary association," and although the indictment does not so state it.

CRANCH, C. J. All indictments upon statutes must state all the circumstances which constitute the definition of the offence in the act, so as to bring the defendant precisely within it; and a conclusion "contrary to the form of the statute," will not aid a defect in this respect. 1 Chitty, Cr. Pl. 281.

It is, in general, necessary, not only to set forth on the record all the circumstances which make up the statutable definition of the offence, but also to pursue the precise and technical language in which they are expressed. Foster, Cr. L. 424; Cro. Jac. 607; 11 Co. 58; 2 Hale, H. P. C. 170; 2 Leach, 1107; 2 Hawk.

c. 25, § 110; Bac. Ab., Indictment, H. 2; Hard. 21; 8 T. R. 536; 2 East, Cr. L. 985, c. 19, § 58.

So, in an indictment for perjury upon the statute, the word "wilfully" must be inserted, because it is part of the description which the act gives of the crime, though in an indictment for the same offence at common law, that precise term is not essential, but may be supplied by others that convey the same idea. These rules respecting the exact words of the statute by which the offence was created, apply equally to acts of the legislature by which the benefit of clergy is taken away from offences which existed at common law; for, if the crime be not, in general, brought within the exact words, the prisoner can recover judgment only as if no alteration had taken place, and the statutes had never been enacted. 1 Chitty, 195. And the same rule applies where an offence at common law is made a crime of a higher nature; as where a misdemeanor is made a felony; or a felony a treason. 2 Hale, H. P. C. 192.

Upon an indictment for murder, the jury may find the prisoner guilty of manslaughter, because the crimes are of the same nature, and only differ in degree. 1 Hale, 449.

In the present case the indictment is for a felony. It charges that the defendant did "feloniously utter," &c. If the word "feloniously" and "against the form of the statute," can be rejected as surplusage, the indictment seems to describe a common-law offence with sufficient certainty, but that offence is only a misdemeanor. 3 Chitty, Cr. Pl. 1022. Can the Court, upon an indictment for felony, give judgment as for a misdemeanor, upon a general verdict?

By the English common law, it cannot; nor is it competent for the jury to find a verdict for a misdemeanor upon an indictment for felony. 1 Chitty, Cr. Pl. 310, 367, 368, 369. The judgment must correspond with the verdict, and the verdict with the indictment; so far, at least, as regards the nature of the offence. Here the verdict is, guilty of felony. No precedent of a judgment as for misdemeanor, on such a verdict, can be found.

It does not seem to me that this indictment describes a case within the statute, (the Penitentiary Act of 2d of March, 1831.) It does not aver that the defendant uttered "a paper writing," or "printed paper;" nor does it aver that the check, which was uttered, was "to the prejudice of the right of any other person," &c. At common law, to constitute forgery, it is not necessary that the right of any person should have been actually prejudiced. The forgery, may, or may not, have produced the intended injury; and it is not necessary to aver, in an indictment for forgery at common law, that the act was done to the prejudice of the

right of any person. It is sufficient to state that it was done with intent to injure or defraud some other person. If the forgery be detected before the injury has been done, it is less prejudicial to society, than if the fraudulent object had been attained; and therefore Congress may have thought proper to punish a forgery which has been effectual, more severely than one which has not produced an actual injury to some individual or body politic.

The words, "to the prejudice of the right of any other person," cannot be used as merely indicative of the intent with which the act must be done; for that intent is expressly declared by the words which immediately follow, namely, "with intent to defraud such person." The act may be done to the prejudice of the right of another, but it is not forgery, either under the statute, or at common law, unless it be also done with intent to defraud some person.

I therefore doubt whether, in order to bring the offence within the Penitentiary Act, the indictment should not have stated the uttering of a forged "paper writing," or "printed paper," "to the prejudice of the right of some person.

But it is said to be a good indictment under the Maryland Act of 1799, c. 75. I think it is not. That act makes it felony to forge, &c., "any order for the payment of money;" and a check may be an order, but it ought to have been so called in the indictment. Neither the indictment nor the verdict can now be amended. It is an indictment for a felony, with a general verdict; and if the word check is a sufficient substitute for the word "warrant, draft, or order" for the payment of money, it is a good indictment for felony; and upon an indictment for felony, as before observed, judgment cannot be given as for a misdemeanor. But this principle is now denied, and the case of *Scholfield*, in 2 East's Cr. L. 1028, is referred to.

That indictment was not for felony, but for a misdemeanor in attempting to commit a felony.

So in *Holmes's case*, 2 East, Cr. L. 1023, the offence described in the indictment was only misdemeanor as it appeared upon the face of the indictment, although the act was stated to be done feloniously; and the court, seeing that the offence, as charged, could not be a felony, gave judgment as for a misdemeanor.

So also in *Wertbeer's case*, for stealing a commission, (Strange, 1137,) and *Joyner's case*, Kelyng, 29, for stealing a fixed copper boiler, it was manifest that the offences, as charged, could not be felonies. Chitty, (1 Cr. L. 456,) speaking of the plea of *autrefois acquit*, says, "if the first charge were such an one as that the defendant could not have been convicted of the latter upon it, the acquittal cannot be pleaded. Thus, if the first charge were a

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felony, or stealing, and the second for a mere misdemeanor, the previous acquittal will be no bar ; for a felony, or larceny, cannot be modified, on the trial, into a trespass or misdemeanor."

See also, 1 Chitty, 638, where the principle is stated which forbids judgment to be given as for a misdemeanor upon an indictment for felony. See also 2 Hale, 172.

For these reasons I think the judgment ought to be arrested.

The prisoner was pardoned, upon the recommendation of the Court.

UNITED STATES v. WILLIAM PLYMPTON.

A forged paper, inclosed at Baltimore in a letter directed to a person in Washington, D. C., and put into the post-office at Baltimore, is not an uttering of the note in Washington.

INDICTMENT for forgery, by altering two checks on the Baltimore Savings Institution, 27th August, 1831; and for uttering them, knowing them to be so forged. The counts for forging the checks were abandoned.

Upon the counts for uttering, &c., the uttering, attempted to be proved, was by putting the altered checks, inclosed in a letter, into the post-office in Baltimore in Maryland, directed to Richard Wright, in Washington, D. C.; which was like the case of the *United States v. Wright*, at December term, 1821, and April term, 1822, in this Court, (2 Cranch, C. C. 296,) where the forged paper was put into the post-office in Tennessee, inclosed in a letter directed to a person in Washington; in which case this Court, upon a special verdict, decided that the uttering was not in Washington county.

Upon the authority of that case, the COURT (THRUSTON, J., absent,) instructed the jury that the facts proved did not show an uttering in this county.

Verdict, not guilty.

UNITED STATES v. WILLIAM PLYMPTON.

An indictment cannot be sustained in Washington county, D. C., for obtaining money by false pretences made out of the county.

Quære, whether it is not necessary that all the facts which constitute the offence should have occurred in the county where prosecuted.

INDICTMENT for obtaining money by false pretences.

It appeared that the false pretences were made in Baltimore, where the acceptances obtained thereby were made and paid,

although the defendant obtained money upon them by getting them discounted in Washington county, D. C.

Mr. R. S. Coxe, for the defendant, moved the Court to instruct the jury that there was no evidence to sustain the indictment.

Which instruction the COURT (*THRUSTON, J.*, absent,) refused to give; and also refused to instruct the jury that if the false pretences were made in Maryland, they should find the defendant not guilty, although the money should have been obtained here upon the discount of the bills.

Verdict, guilty; but,

The COURT (*nem. con.*) granted a new trial because the false pretences, if made at all, were not made in this county; and the bills were accepted and paid by the prosecutor, in Baltimore.

MORSELL, J., was inclined to think that if the money was obtained by the defendant in this county, it was sufficient to sustain the indictment.

THRUSTON, J., was of opinion that if the false pretences were not made in this county, the prosecution could not be supported.

CRANCH, C. J., was inclined to the opinion, that all the facts necessary to constitute the offence must have occurred in this county.

CIRCUIT COURT OF THE UNITED STATES.

MAY TERM, 1833, AT ALEXANDRIA.

UNITED STATES *v.* AMOS ALEXANDER *et al.*

If the charter of a bank, indebted to the United States, expires, the United States have no remedy against the debtors of the bank, if there were no actual assignment to the United States before the expiration of the charter.

Several defendants, who have no connection with each other in interest, in estate, or in contract, and against whom, jointly, the plaintiffs have no cause of suit either at law or in equity, cannot be joined in one bill.

THIS was a bill in equity, brought by the United States against the debtors of the Franklin Bank, about three years after the expiration of the charter of the bank, charging that the directors had agreed to assign the effects of the bank to the United States, to whom it was indebted.

The defendants demurred to the bill because it appeared, upon its face, that the charter had expired, and the defendants were, therefore, not debtors of the bank at the time of filing the bill; and also because it joined parties as defendants who had no joint interest, &c.

Mr. Taylor, for the defendants, as to the joining of several defendants, cited 1 Harrison, 289, 406, § 8; *Dawson v. Fenning*, 4 Johns. Ch. Rep. 199; *Binkerhoff v. Brown*, 6 Ib. 139; 1 Har. Ch. Pr. 93; and as to the expiration of the charter, 1 Bl. Com. c. 18, last page.

CRANCH, C. J., delivered the opinion of the Court, (THRUSTON, J., absent.) We think the demurrers in this case must be supported —

1. Because, by the plaintiff's bill, it appears that the charter of the bank expired in 1822, and the bill was not filed until 1825; so that the defendants were not indebted to the bank at the time of filing the bill.

2. Because the bill joins several defendants who have no connection with each other in interest, in estate, or in contract, and against whom, jointly, the plaintiffs have no cause of suit either at law or in equity.

3. Because the bill does not show an assignment of the debts, or any agreement to assign, with the assent of the defendants.

4. Because there is no representative of the bank before the Court, to controvert the assignment.

We are of opinion, therefore, that the bill ought to be dismissed as to the defendants who have demurred.

NEGRO CLARA MOORE v. THOMAS JACOBS.

A female slave, owned in Alexandria, D. C., is removed with her owner to Maryland to reside; she runs away from her owner in Maryland and comes to Alexandria; her owner in Maryland, sells her (running) to a resident of Alexandria. This escape of the slave into Alexandria, was not a voluntary importation into Alexandria; and the sale was not such a sale as could give her a right to freedom under the Maryland law of 1796, c. 67.

PETITION FOR FREEDOM. The petitioner was owned by Mr. Mills, in Alexandria, D. C., who removed to Maryland to reside, and settle there, and took the petitioner with him. She ran away and returned to Alexandria. While there, her owner in Maryland, sold her ("running") to the respondent, Thomas Jacobs.

Mr. Neale, for the petitioner, contended that the sale within three years after the removal gave her a right to freedom, under the third section of the Maryland Act of 1796, c. 67.

Mr. Taylor, contra. There was no sale in Maryland within the meaning and intent of that act. The slave was not then in Maryland, but in Alexandria.

Mr. Neale, in reply, referred to the case of *Delilah v. Jacobs* in this Court at the last term, (*ante*, p. 238.)

The Court (*nem. con.*) was of opinion that the slave was lawfully imported into Maryland; and that her escape to Alexandria was not a voluntary importation into Alexandria county; and that the sale in Alexandria, after such escape, was not such a sale as could give the petitioner a right to freedom under the Maryland Act of 1796, c. 67.

UNITED STATES v. JOSEPH LARNED.

Where the witness has acquired a knowledge of the handwriting of the prisoner, by having often seen him write, &c., it is competent for him to compare the paper in question with the genuine handwriting of the prisoner, and to state his belief resulting from both sources.

INDICTMENT for forging a certificate of freedom.

Upon the trial, a witness, Mr. Keller, stated that he was

acquainted with the handwriting of the prisoner. That about three years ago he and the witness wrote in the same office. When he first saw the paper, if the prisoner's name had not been mentioned, he would not have said, at once, that it was his writing. If the prisoner's name had been mentioned, he would have thought it might be his, but he could not have sworn to it. He took it to the books of record, written by the prisoner; and from the comparison, and a similarity and peculiarity in the form of his capital letters, he did and does believe the paper in question to be in the handwriting of the prisoner.

Mr. Taylor, for the prisoner, objected that this was evidence by comparison of hands, which is not admissible.

The COURT (*nem. con.*) said, as the witness's belief was founded, in part, on his general knowledge of the prisoner's handwriting, and in part on his having compared it with the writing of the prisoner, the evidence must go to the jury with an instruction, that so far as the witness's opinion was founded upon the comparison, it was not evidence.

But the COURT (*nem. con.*) upon consideration of the authorities cited in 4 Starkie, 651, &c., and Addison's Rep. 35, and 6 Binney, 349, said, that they were satisfied that where the witness has acquired a knowledge of the handwriting of the prisoner by having often seen him write, &c., it is competent for him to compare the paper in question with the genuine handwriting of the prisoner, and to state his belief resulting from both sources.

UNITED STATES v. JOHN S. H. H. E. BEALE.

An indictment for using contemptuous language to a magistrate in the exercise of his office, should set forth the words spoken, and the day and month, and that the magistrate was in the discharge of his judicial functions.

INDICTMENT for using contemptuous and threatening language to the mayor of Alexandria, (who is, *ex officio*, a justice of the peace,) in the exercise of his official duties, on the day of , in the year 1833.

The defendant demurred generally, and in proper person stated his objections to the indictment.

1st. That no day or month is mentioned.

2d. That it was not stated that the mayor was in the exercise of his judicial functions.

Mr. Key, United States Attorney, *contrà*.

1. On general demurrer, the defendant cannot take advantage of the omission of the day and month.

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2. The obstruction of the official functions of a town-officer, in the discharge of his official duty, is an indictable offence. It is not necessary to state that it was to the obstruction of justice, or of the judicial functions of the mayor.

The COURT (MORSELL, J., absent,) stopped the defendant, in reply, and said that the indictment was bad, because the words were not set forth; because the day and month were not mentioned; and because it does not state that the mayor was in the discharge of his judicial functions.

Judgment for the defendant on the demurrer.

Ex parte JOHN H. PLEASANTS.

A witness residing in Virginia, cannot be compelled by attachment, to attend the Circuit Court of the District of Columbia, in a criminal cause—by the opinion of Mr. Justice Brockenbrough.

Mr. Key, United States Attorney for the District of Columbia, moved the Court (MORSELL, J., absent,) for an attachment of contempt against John H. Pleasants, who resides in Richmond, in Virginia, for not obeying a summons to attend as a witness on behalf of the United States, before the grand jury of Alexandria county, in the District of Columbia, immediately.

Thomas Woodward, deputy-marshal of the District of Columbia, made affidavit that he served the annexed summons on J. H. Pleasants, in the city of Richmond, in Virginia. The summons was directed to "the marshal of Virginia," and says, "You are hereby commanded to summon John H. Pleasants to appear before the United States' judges of the Circuit Court of the District of Columbia, for the county of Alexandria, at the courthouse in the town of Alexandria, to testify and the truth to say on the behalf of the United States, before the grand jury of the said county of Alexandria; and this he shall in nowise omit, under the penalty of \$333.33, and have then there this writ," &c.

Mr. Key, made an official statement in writing and in substance, that Pleasants is editor of the Richmond Whig; that he has seen in the Whig, a letter published from some person in Alexandria, to some person in Richmond; (and produced the paper, the Whig of 8th of May,) that the grand jury have now before them for consideration, a bill of indictment charging R. B. Randolph and sundry other persons as having conspired to commit an assault upon the President of the United States in the county of Alexandria, and that he expects the said Pleasants can prove, &c.

The COURT (MORSELL, J., absent,) refused to issue an attach-

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ment without a previous rule to show cause, which was granted, returnable on the 17th instant ; provided a copy of the order, &c. be served on the said Pleasants on or before the 12th instant.

CRANCH, C. J., however, had doubts whether the subpœna was well served so as to bring the witness into contempt.

No cause having been shown, upon the return of the rule, an attachment was issued and served by the marshal of Virginia ; but he was discharged by Mr. Justice Brockenbrough, upon *habeas corpus* ; who delivered the following opinion, as published in the Alexandria Gazette of the 26th of November, 1833.

Ex parte John H. Pleasants, on a writ of *habeas corpus*. The applicant is in the custody of the marshal for the Eastern District of Virginia ; and has petitioned for, and obtained, a *habeas corpus* to relieve him from what he alleges to be an illegal detention.

The marshal has made a return to the writ, by which it appears that he arrested the petitioner under authority of an attachment issued from the Circuit Court of the District of Columbia, for the county of Alexandria, for a contempt by him committed in not attending the said court as a witness, after being thereto legally summoned. The attachment itself, and the previous proceedings, together with an affidavit of the attorney of the District of Columbia, are annexed to the returns. By these, it appears that the grand jury of that county have before them a bill of indictment charging Robert B. Randolph and others with a conspiracy to commit an assault on the President of the United States, in the said county, and that, in the estimation of the said attorney, the said Pleasants may be a material witness in the said prosecution.

Many important subjects have been brought into view during the discussion ; of which I shall notice such as I shall deem necessary to enable me to form a correct opinion on the case.

At the very threshold I am met with the objection, that this Court cannot take cognizance of the case, because the arrest, of which the applicant complains, has been made by virtue of process of a court of the United States, who alone can judge of the legality of the arrest. This is a delicate question, and is attended with difficulty. When I look to the *habeas corpus* act, I find that its provisions are very general and comprehensive. It declares, ~~that~~ whenever a person detained in custody, (whether charged with a criminal offence or not,) shall apply for a writ of *habeas corpus ad subjiciendum*, and shall show by affidavit, or other evidence, probable cause to believe that he is detained in custody without lawful authority, it shall be the duty of the Court to award the writ. And the court before whom the prisoner shall be brought, shall proceed to inquire into the cause of his imprisonment, and shall either discharge him, admit him to bail, or remand him into

custody, as the law and evidence shall require. In every case in which there is a detention without lawful authority, the Court may relieve the party detained. It would seem that if the commitment be made by a court having jurisdiction to commit, the Court ought not to discharge, although the judgment of the committing court be erroneous. But if it be made by a court having no jurisdiction, then the discharge may be made.

Without going into the controverted question of commitments made under unconstitutional, and, therefore, void laws, there may be cases, in which, under constitutional and valid laws, a Circuit Court of the United States may exceed its commission. It may exercise powers which the law will not warrant. By such unwarranted jurisdiction, they may seriously encroach upon the personal liberty of men whom the State courts are bound to protect. Would not the judges, in such cases, neglect their duty if they failed to protect them?

In the present case, a foreign court, that is, a court sitting beyond the limits of Virginia, and alleged to have only a local jurisdiction, has sent its process beyond its own territory, and arrested an individual within the jurisdiction of this Court.

I find it to be a general principle that the courts of one State or county cannot issue its process into another, without the consent of that other; but the Court of Alexandria claims an exemption from that general principle, and undertakes to arrest a citizen within our jurisdiction. When that citizen claims the protection of our own laws, surely it becomes a proper subject of investigation here, whether that court is bound by the general principle, or comes within the exemption which is claimed.

I am of opinion that I ought to entertain jurisdiction in the case.

A great deal of ingenious and forcible argument has been used, to prove that the federal courts have no right to attach for a contempt of their process, or, indeed, to punish, by attachment, in any case.

I do not, however, agree with the counsel in many of the views he has presented on this subject. In our State courts there is no doubt of the existence of the power. We are in the daily habit of imposing fines, or attaching witnesses who refuse to obey the process of subpœna, and I do not see how courts of justice can perform the business before them, without the exercise of this or some equivalent powers.

My opinion is that the Constitution does vest in Congress the power of arming their courts with those powers which are necessary to enable them to discharge their duties; and in one case it imperatively requires that the courts should exercise them; for the sixth amendment declares, "that in all criminal prosecutions,

the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor."

Before the establishment of the Constitution, it was well known in every State of the Union what was the nature and character of the compulsory process by which the commands of the courts were enforced.

The process of attachment was a well-established process for that purpose; and when the Constitution vested Congress with the power of establishing courts, the seventeenth clause of the eighth section may fairly be understood as vesting them with power of authorizing those courts to issue attachments, or other process necessary to carry their orders into effect. But I have not yet seen any law of Congress which authorizes the Circuit Courts of the United States, in any case, to issue attachments, to run into another district or State than that in which they are holding their courts. It was deemed necessary to give an express authority, by the Act of 1793, to the courts, to issue subpoenas into another district or State. The act did not follow up this grant, by authorizing attachments to run into any other State, in case of disobedience of the process of subpoena.

The service of any kind of process from one State in another State, was, at that time, unusual, and if it was necessary that a law should be passed to sanction that practice, it is much more necessary that the more searching and more compulsory process of attachment should be authorized by law.

If this case, then, rested here, I am of opinion that I should be justified in discharging the prisoner, unless some act of Congress can be shown, authorizing a circuit court of the United States to issue attachments into another State than that in which it is sitting. But the investigation which has taken place here, will probably justify, if it does not require, that I should examine the question, whether the Circuit Court of the District of Columbia has a right to issue process of *subpœna* beyond the territory of the District, in a case arising under the municipal laws of the District.

The Judiciary Act of 1789, § 14, [1 Stat. at Large, 73,] declares that the courts of the United States "shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law."

The Act of 1793, § 6, [1 Stat. at Large 333,] declares, "that *subpœnas* for witnesses who may be required to attend a court of the United States, in any district thereof, may run into any other district, provided, that, in civil cases, the witnesses living out of the district in which the court is holden,

do not live at a greater distance than one hundred miles from the place of holding the same."

These early acts were applicable to the circuit and district courts of the United States, which had been recently established.

The District Court of Columbia was established afterwards; and, on the 27th of February, 1801, the first act was passed "concerning the District of Columbia," [2 Stat. at Large, 103.]

The first section of that act declared, "that the laws of the State of Virginia, as they now exist, shall be, and continue in force in that part of the District of Columbia which was ceded by the said State to the United States; and that the laws of the State of Maryland, as they now exist, shall be, and continue in force in 'the other part of the District,'" &c. The second section of the act forms the District into two counties, and directs that a court shall be holden in each. The third section organizes the court. It declares, "that there shall be a court in each district," ("county,") "which shall be called the Circuit Court of the District of Columbia; and the said court, and the judges thereof, shall have all the powers vested in the circuit courts, and the judges of the circuit courts of the United States."

It is this latter clause, taken in connection with the sixth section of the Act of 1793, which is supposed to confer on the Circuit Court of Alexandria, the power to issue its process of *subpœna*, in all cases which may be brought before it, into any other district; and I am now to inquire into the correctness of this opinion.

Let it be remembered, that the courts of the United States, established under the third article of the Constitution, are vested with limited powers only. If a case does not arise under the Constitution or laws of the United States, or treaties made under their authority; or if it does not affect ambassadors, other public ministers, or consuls; or if it is not one of maritime or admiralty jurisdiction; if it is not a controversy to which the United States are a party, or between two or more States; or between a State and citizens of another State; or between citizens of different States; or between citizens of the same State, claiming lands under grants of different States; or between a State and (or) citizens thereof, and foreign States, citizens, or subjects; if such be not the state of the cases, the federal courts have no jurisdiction. In that large class of cases arising out of the municipal laws of a State, the federal courts have no jurisdiction, the State courts, exclusive jurisdiction. In all cases of crimes committed against a State; in all cases of contract between citizens of the same State; in all cases of alienation, or descent of lands, in which citizens of the same State are concerned; in all cases of *meum* and *tuum*, whether in law or equity, between citizen and

citizen; in short, in the every-day business of life, between members of the same sovereignty, the State courts alone have the jurisdiction. It is obvious, then, that, large as is the jurisdiction of the federal courts, that of the State courts is much more extensive.

When Congress, by their Act of 1793, [1 Stat. at Large, 333,] authorized the process of *subpæna* to issue from one district to another, the effect was to authorize the circuit courts to send such process beyond the limits of the State in which they were located. But the State courts had no power to send out such extra-territorial process. This, then, was the state of things when the District of Columbia was organized. There were, in each State, two distinct sets of tribunals, emanating from, and belonging to, different political bodies. To the one set was confided the power of issuing process of *subpæna* out of their own bounds; to the other, it was denied.

Thus, the Circuit Court of the United States, for the district of Virginia, sitting in Richmond, could send a *subpæna* for a witness, to Maryland; but the district court of Henrico, or the general court of Virginia, sitting in the same place, had no such power.

The broad distinction between the subjects of jurisdiction in the two sets of judicial tribunals, was plainly in the view of Congress when they undertook the task of providing or adopting a system of laws for the District of Columbia.

As the two States had parted with all jurisdiction over the District, and the people contained therein, it became necessary to organize a court or courts for the District. They had the exclusive power of legislating for it. It was in their power to have two sets of courts, as in every other part of the United States; that is, one court to be vested with federal powers, another court with municipal powers. But the size of the territory, and the number of people did not require such a division of courts; and considerations of economy, probably, forbade the appointment of so many judges. They therefore decided on having only one court, which they denominated the Circuit Court for the District of Columbia. But still they kept up the distinction between federal judicial power, and municipal, or *quasi* State judicial power; although they conferred both kinds of power on the same court.

Thus, in the first section they enacted that the laws of the State of Virginia should continue to be the law of one part of the District, and the laws of Maryland of the other. Previously thereto, the Constitution and the laws of the United States had disrobed the States of Maryland and Virginia, as well as the other States, of all those powers which had been conferred on Congress, and had disrobed the courts of those States of all those

judicial powers which had been conferred exclusively on the federal tribunals. What laws of Virginia and Maryland were thus declared to be in force in the District of Columbia?

They are the municipal laws of those States — the laws founded upon the reserved rights of those States. Amongst those laws of Virginia and Maryland which are thus continued in force in the District, I will ask whether there were any which authorized the process of the courts of the one to run into, and be exercised in the other? Very far from it. On the contrary, it was a fixed principle of those laws that the process of their courts should not issue beyond their territory. When the laws of Virginia and Maryland were adopted for the District, by this section, that principle was adopted with them, and consequently the process of the courts of this District, so far as it was required to carry into effect those laws, could not issue beyond the territory of the District.

I presume it will not be contended, that, as before the cession, process could run from Alexandria into the different counties of Virginia; so, after the cession, by the adoption of the Virginia laws, the process of Alexandria will still run into Virginia. If this should be said, it will be answered, that, by the cession, Alexandria and a part of Fairfax were cut off from Virginia so as to be no longer any part of her territory; and process, therefore, could no longer run from Virginia into that separated territory, nor *vice versâ*.

Amongst the laws of Virginia, thus adopted by Congress, were the laws concerning assaults and conspiracies. These were common-law offences, and the punishment for them was plainly prescribed. In neither of these cases, nor in any other case, of either criminal or civil character, was there any law of Virginia (nor is there now,) by which a witness could be taken by process of a Virginia court, from any place beyond her territory, and brought to Virginia to testify. This may be a defect, but it is one which grows out of our political conditions, and can only be remedied, I presume, by the consent or agreement of the State.

Such is the character of the laws of Virginia and Maryland which were adopted for the District of Columbia, by the first section of the Act of February, 1801. Congress, in thus prescribing for the District a code of municipal laws, intended to act for them in the same character that the legislatures of the several States act towards the people of their several States. They had previously provided for them a set of federal laws, in common with the rest of the United States. For, as the District, in a different form, and under its former organization, as parts of two States, had always been, and still continued, a part of the United

States, the laws, previously enacted by Congress, growing out of the granted powers, were still applicable to them, and it was not thought necessary to reenact them specially for the District. Thus, the people of the District were immediately provided with two sets of laws, municipal and federal. It then became necessary to provide a court or courts, to carry into effect, within the District, as well the federal as the municipal laws. They created one court for the whole district, and vested it with "all the powers, by law, vested in the circuit courts of the United States." Sec. 3.

It has been argued that as the sixth section of the Act of 1793, declared that subpœnas for witnesses who may be required to attend a court in any district, may run into any other district, so the Circuit Court for the District of Columbia, being vested with the same powers, may direct subpœnas to run, in all cases of which they have cognizance, from their district into any other district. But this, I apprehend, is a *non sequitur*. The power conferred by this third section, on the Circuit Court of Columbia, is the same with that conferred on the other circuit courts, and not greater. What, then, were the powers *quoad hoc*, conferred on the other circuit courts? To issue subpœnas into another district, in cases, before them, of which they had cognizance, that is, in federal, not municipal cases; of these latter they have no jurisdiction, and, therefore, cannot, in such cases, issue subpœnas into another district.

But the Circuit Court of Columbia has the same powers with those of the other circuit courts; that is to say, they have the power, in federal cases, to issue subpœnas to another district; but in municipal cases, in cases arising under the laws of Virginia and Maryland, they have no such power.

To allow them the power in such cases, is not to give them merely all the powers belonging to the other circuit courts; but more than all; which cannot be allowed. They would have more powers on this subject than all the other courts, state and federal combined, if this were permitted.

If, instead of blending all the judicial powers of the District, federal and municipal, in the same court, they had been separated as they are in every State in the Union, there would be no difficulty on this subject. If, after adopting the laws of Virginia and Maryland, in the first section, they had created a court to carry into effect the federal laws of the Union, and vested that court with all the powers abiding in the circuit courts of the United States, every one would see, that whilst to the latter the power in question was given, from the former it was withheld.

If to any one it seems strange that the courts of the same dis-

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trict should have a power, or not, according as the subject before them is of a federal or a municipal character, I can only say that a similar spectacle may be seen in every State in this Union. If a man be charged with robbing the mail in Henrico, and be brought before the Circuit Court of the United States sitting in Richmond, the judges of that court may send their process for the witnesses to any district, that is, any State in the Union. If the companion of that man be charged with robbing, on the highway, passengers in a private carriage, and be brought before the Circuit Court of Henrico for trial, the judge of that court cannot send process for witnesses to Alexandria, Baltimore, or any other place out of the State.

It has been said, that the Congress of the United States in legislating for the District of Columbia acts as the Congress of the whole United States, and not as the legislature of that particular place.

I cannot understand this doctrine. The laws of the United States, passed by virtue of the powers specified in the first fifteen clauses of the eighth section, apply to the people and territory of the ten miles square, in common with the rest of the people of the United States. But the 16th section gives to Congress power to exercise exclusive legislation over that district. This power consists of two parts: 1st, the specific given power of federal legislation; and 2d, the residuum of legislative power which, in other cases, is reserved to the States. This residuum is, surely, as much local as is the legislative power of the States. Congress stands, to the District, in the same relation that the State legislatures do to the respective States. And as a State legislature can only legislate for its own State, and cannot enforce its laws beyond its own limits, so neither can Congress, in legislating for the district, cause its district laws to be carried into effect in the States without their concurrence. The total legislation of the States is made up of federal legislation by Congress, and of local legislation by the State legislatures. How can the legislation of the District consist of more parts? All that it can ask is, federal and local jurisdiction. If, in addition to these, you give it a local legislation which is to operate generally, not in that place only, but in all other places, you mar the beauty and symmetry of the whole federal system, and confer on Congress a power of doing, indirectly, that which it cannot directly perform. Congress cannot pass municipal laws for the States; but if, in passing municipal laws for the District, they can affect or impair the municipal laws of the States, they do legislate for the States on those municipal subjects. In taking this view of the Constitution, I should say that Congress had no right to pass any law directing the process of the courts of Columbia to run into any of the States for the pur-

pose of enforcing the merely municipal laws of the district, though these municipal laws be enacted or adopted by Congress itself. I do not, however, think that they have, as to this matter, passed such a law ; as I have already endeavored to prove.

Upon the whole, I am clearly of opinion, that the applicant is detained in custody without lawful authority, and that he must be forthwith discharged. See *United States v. Christiana Williams*, in this Court, at November term, 1833, (*post.*)

THE FARMERS BANK OF ALEXANDRIA v. JOHN HOOFF *et al.*

A devise by the testator to his wife "during her widowhood, or in other words while she should bear his name ; but in case she should choose to marry again, then it was his wish that the whole of his estate, both real and personal, should be given to his daughter and her heirs forever," is a devise to the widow during widowhood, with a vested remainder to the daughter in fee.

THIS was a bill in equity to compel the execution of a trust to sell land of Mary Resler, after her death to pay her personal debt to the plaintiffs under a deed of trust in fee made by her to the defendant John Hooff and others.

Her title was under the will of her husband, Jacob Resler, by which he devised to her "the whole of his estate both real and personal during her widowhood, or in other words while she should bear his name ;" but, in case his wife "should choose to marry, then it was his wish that the whole of his estate, both real and personal, should be given to his daughter Eve Resler, and her heirs forever."

It was contended on behalf of the plaintiffs, that the widow took a conditional estate in fee, liable to be defeated by her marriage.

MORSELL, J. The complainants, in this case, seek to have the benefit of a deed from Mary Resler in trust to secure to them the payment of a debt due by her, and on her own account. The property conveyed is a lot of ground, of which her husband died seized, claimed to be held in fee-simple under the will of her husband. Whether she took such an estate, or an estate for life, depends on the true construction of the will, unassisted by any introductory declarations, or by circumstances to be drawn from the context. Nothing is left us but the words of the devising part of the will. The rule, no doubt, is that the intention of the testator ought to prevail, unless inconsistent with the rules of law ; and in case of contending intentions, the one which was most likely to have been the favorite intention of the testator. The objects in the mind of the testator requiring his provision, appearing on the face of the will, were three ; the payment of his just debts and funeral expenses ; a provision for his wife, and an only child, a daughter.

In most cases, the child is considered the principal object of the father's bounty ; the presumptions of law, also, are strong in behalf of the heir.

In this case the presumptions both of nature and law, unite in favor of the daughter ; and there is nothing to deprive her of the benefit, unless from the whole will, taken together, the testator has plainly and clearly so intended himself to be understood. The words "I give and bequeathe unto my beloved wife Mary Resler, the whole of my estate both real and personal," if they stood alone, I admit, would, by legal construction, carry a fee ; but they may be so explained as to show that they were intended either to describe the property only ; or so qualified and limited in their extent as to give a less estate or interest.

The words "during her widowhood, or in other words, while she bears my name," immediately follow ; and if the clause had ended with these words, it would be equally clear, I suppose, that no greater interest than a life estate would have passed. In Co. Lit. 234, Lord Coke says : "this word, (*durante*,) is properly a word of limitation ; as *durante viduitate*, or *durante virginitate*, or *durante vitâ*," &c. ; and I believe all the books agree that an estate to a woman during her widowhood is an estate for life only. What effect ought, then, to be given to the subsequent words ; "but in case my wife should choose to marry, it is my wish that the whole of my estate, both real and personal, be given to my beloved daughter Eve Resler and her heirs forever" ?

To say that by taking them in connection they so explain the preceding words as to change their operation from limiting an estate for life, to passing an estate in fee with condition subsequent, would be to change them from the peculiar use to which they are always devoted. We read frequently of words of condition being turned into words of limitation, but never *e converso*, that I remember. Such a construction would also produce the effect of enlarging the original words of limitation from a life-estate into an inheritance ; but this is never done, unless indispensably necessary to support and sustain an estate in remainder, and in favor of him in remainder. 1 P. Williams, 149.

As to the argument, founded on the inference that the limitation over to the daughter could only take place upon the contingency of the widow's marrying again, and not on her death without marrying ; and that unless the wife took such a conditional fee, the testator would have died intestate, as to the reversionary interest, which it is not to be supposed he intended to do ; if this were not the case of an heir at law, and it were necessary for the purpose of maintaining a different construction, I think there would be authorities to bear me out ; and that in cases of similar

limitations the law has been settled, that upon the happening of either event, the remainder-man would take in possession.

The first case which will be mentioned is that of *Brown v. Cutter*, T. Raym. Rep. 428. The words of the will were, "I will that my wife shall have and enjoy all my houses, lands, &c., during her natural life, if she does not marry; but if she do marry, then I will that my son Humphrey, presently after his mother's marriage, enter and enjoy the said premises, to him and the heirs male of his body, and for default of such issue to my son Robert and the heirs male of his body," with remainders to his other sons, and so over to a stranger. The wife died without marrying. In that case it was determined that Humphrey, the son, took a vested remainder, to take effect, in possession, on the marriage or death of the wife.

Bro. Parl. Ca. 260; I. S. gives all his personal estate to trustees, to pay the interest thereof to his wife, so long as she should continue his widow; but if she married again, then he directed his trustee to pay her an annuity of £110, and no more during her life; and in that case he gave the residue of his estate to his son P.; but made no disposition thereof in the event of his wife's not marrying again. The wife did not marry; and upon a question to whom this residue belonged, the court held that it belonged to the representatives of the son, who had attained the age of twenty-one, and died in his mother's lifetime; or in other words, that there was a vested remainder in the son which might take effect in possession in his representatives upon the marriage or death of his mother.

Gordon v. Adolphus and others, Bro. Parl. Ca. 154, where a man bequeathed his estate to his wife so long as she should remain unmarried; but if she married, then to his daughter; and in case the daughter should die without leaving issue, then to I. S. The daughter died without issue, in the mother's lifetime, who still remained a widow. Held, that the reversionary interest belonged to I. S. after the death of the daughter, although the wife should die without marrying.

There is one other case of a devise, in Ambler, 209, in which the Lord Chancellor thus expresses himself: "When an estate is given during widowhood with remainder over; in that case she takes an estate for life determinable on her marrying, and the remainder takes effect on the determination of her estate either by death or marriage."

In the present case, it is given during widowhood with remainder over on her marrying again within a limited time, that is, in the lifetime of his daughter, and is by way of forfeiture; so that, if it were necessary, for effecting the intention of the testator, I

should be sustained, I think, in the position, that the remainder might take effect in possession, on the death of the mother. But I do not think it of importance, as the true question is, when did the estate of the wife end ?

The testator might have reflected that he had but one child, she an heir at law. That she would inherit it, whether he gave it to her, or not, expressly ; that a limitation over to her, of such an interest, being nothing more than the law would have cast upon her, would have been void. It is no uncommon case, when a father intends to let his children have his property equally, to leave it to legal distribution, as it respects them. As to the wife, it is sometimes desirable to give her something more than her thirds, to which the law limits her, and to provide for it, of course, by will, as in this case.

Those words in the latter part of the clause in the will first alluded to, are important to show in what event, even sooner than the death of the widow, the reversionary interest might take effect in possession, in the daughter ; and as important to show in what sense the words, "the whole of my estate both real and personal," are to be taken.

Let it be observed, then, that the testator, in the gift to his daughter, uses the very same words, with the superadded words of inheritance, "to my beloved daughter Eve Resler and her heirs forever."

It would appear, therefore, that when he intended to give an estate of inheritance, he understood the technical language by which it might be done, and used it, not choosing to use words of doubtful construction. This, I think, would be the plain, common-sense inference from such a circumstance ; and I think it also sanctioned by legal adjudication ; for which purpose I refer to *Chester v. Painter*, 2 Peere Williams, 336. "One devises one third of all his estate whatsoever to his wife, and two thirds of all his real and personal estate to his son I. S. and his heirs ;" the wife has but an estate for life in the third part of the real estate ; the word "estate" being intended to describe the thing only ; and when the testator intends to pass a fee, he adds the word "heirs" to the word estate. S. P. 2 Peere Williams, 335.

I am aware of Lord Chancellor Talbot's decision in the case of *Ibbetson v. Beckwith*, Cases Temp. Talbot, 161. In that case the word "estate" had been repeatedly used, in the former part of the will, in connection with words which plainly and clearly showed an intention to pass an estate of inheritance.

The Chancellor's words are, "The clause whereby the estates are devised over to his mother and her heirs, in case Thomas should refuse to take his name, hath been argued as proof of his

intending him but an estate for life; but that depends upon the construction of the word estate; which will be clear from the sense he hath taken it in through all the other parts of his will, where, whensoever he hath used it, he has meant thereby to pass the inheritance. It hath been said, indeed, that in those clauses the fee doth not pass from the force of the words, but from the nature of the purposes, namely, that of paying debts, &c.; but still the words are an argument that he intended to pass the inheritance, though not the whole argument."

I do not think it necessary to recite the whole of the Chancellor's argument. The case can be referred to, if necessary to see it at large.

There is, however, one other part that I will notice. When summing up his reasons, the Chancellor said, "Another objection has been made, that if he intended him an estate of inheritance, he would have given it him in the same words as he has limited it over, upon his default of taking his name; but this wording is so incorrect that I think no stress can be laid upon it. What weighs with me is the intent plainly appearing to pass the inheritance, as is manifest from the other clauses of the will."

It requires no very critical comparison of the two cases to discover the substantial differences in them; and that the rule as laid down in the case in *P. Williams*, is still good law, and may be applied to influence and govern this case.

If the testator had intended to give the whole of his estate in fee to his wife, believing that she would give it to the daughter in the event of her death, he would have expressed some such wish.

It can hardly be supposed that when, by the mother's death, she might be deprived of any aid from her and left in the most need of his assistance, he should not even intimate a wish that she should be provided for.

I think, therefore, that the prevailing intention of the testator, and the true construction of the will is, that his wife should have his property real and personal for her comfort and support during her life, if she remained unmarried; but if she preferred marrying, it would be probable she would not so much need his bounty. Also, in that event, it would not be desirable that his property should be under the control, directly or indirectly, (even during her life,) of such an after-taken husband; in such an event, therefore, the estate should immediately cease. By such construction, his will would liberally provide for his wife; and the only child and heir at law would not become disinherited, but take the reversionary interest; the testator would be made to look to two events, on the happening of either of which, the estate would become his

child's; the one presently, if the widow thought proper to marry; the other more remotely, upon her death.

CRANCH, C. J. The estate given to the wife by the will of Jacob Resler is "during her widowhood, or, in other words, while she bears my name;" but in case she should choose to marry again, then it was his wish that the whole of his estate, both real and personal, should be given to his daughter, "and her heirs forever."

The estate is expressly, during her widowhood; and at the termination of that estate, it is as expressly given to his daughter in fee.

According to the literal construction of the will, the devise to the daughter was to take effect only upon the marriage of the widow; an event which might never happen; and if that strict construction could be given to the will, the remainder to the daughter would be contingent. But would such a construction be consistent with the intention of the testator?

There is no reason to suppose that he intended to die intestate as to any part of his estate, which would be the case upon such a strict construction, if the widow should never marry again; unless the devise had been in such words as could be construed to carry the fee to the wife.

But the testator has used as precise words of limitation, as could be used, to show that he intended to give her only an estate during widowhood; and it is a much less strained construction of the will to suppose that he intended to give the fee-simple to his daughter after the termination of the estate during widowhood, than that, (contrary to the express words of limitation,) he intended to give a fee-simple to his wife determinable upon her second marriage.

It is evident that he knew the use of precise words of limitation. He has expressly, and by the most apt words, limited the quantity of estate given to his wife and to his daughter; that is, an estate during widowhood to the wife, with remainder in fee to the daughter.

The only question is, whether the remainder was contingent or vested.

We think it was intended to be a vested remainder, to come into possession at the termination of the estate of the wife.

The words, "but if my wife shall choose to marry, it is my wish that the whole of my estate, both real and personal, be given to my beloved daughter Eve Resler and her heirs forever," might have been used *ex abundanti cautela*, to show the intention more explicitly, that the daughter should come into possession of the whole estate, personal as well as real, upon the second marriage of the widow.

Upon the question of construction we have been referred to Butler's edition of Fearne on Contingent Remainders, p. 241, c. 1, § 10, § 4, and the cases there cited. Also to the following cases: *Brown v. Cutter*, T. Raym. 428; *Gordon v. Adolphus*, 3 Br. Parl. Ca. 306; *Chester v. Painter*, 2 P. Will. 336; *Ibbetson v. Beckwith*, Ca. Temp. Talbot, 157; *Bamfield v. Popham*, 1 P. Will. 55; *Idle v. Cook*, Id. 78; *Tomlinson v. Dighton*, Id. 154; *Sheffield v. Lord Orrery*, 3 Atk. 382, and the cases cited by Preston in his book on the Quantity of Estates. And upon the whole, we are of opinion that the widow took only an estate during widowhood; and that the daughter took a vested remainder in fee.

Bill dismissed with costs. (THRUSTON, J., absent.)

CIRCUIT COURT OF THE UNITED STATES.

OCTOBER TERM, 1833, AT ALEXANDRIA.

FARMERS BANK OF ALEXANDRIA v. WILLIAM FOX.

The Corporation of Alexandria, D. C., is authorized to tax the Farmers Bank of Alexandria, and to collect the tax by distress and sale of the goods of the bank.

TRESPASS against the collector of corporation taxes, for entering the plaintiff's banking house and carrying away goods. Justification, as collector, &c.

Mr. Taylor, for the defendant, referred to Act of Virginia, 1779; Acts of Congress, 25 February, 1804, [2 Stat. at Large, 255,] and 13 May, 1826 [4 Stat. at Large, 162]; Town Revenue Law of 1835, and for appointment of assessors and collectors. The appointment of assessors and their returns; the appointment of collector, and delivery to him of a list of taxes to be collected.

The cause was submitted to the Court upon the following case: The defendant, as collector of taxes for the southern district of the Corporation of Alexandria, entered the banking-house of plaintiffs and seized the bank-notes as a distress for a tax of \$200, alleged to be due to the corporation, and carried away the bank-notes which he seized, and they were lost to the plaintiffs. That the capital actually paid in, was \$310,000; and the capital of the Mechanics Bank actually paid in, was \$372,544. The capital of the Bank of Alexandria and Bank of Columbia, was each \$500,000. That the Corporation of Alexandria had laid a tax of \$200 on each of the said banks, by an act of the corporation therein afterwards mentioned.

The defendant gave in evidence the Act of Virginia incorporating the town of Alexandria, passed October 4, 1779; the Act of Congress, 25 February, 1804, to amend the charter of Alexandria; the Act of Congress of 13 May, 1826, further to amend the charter of Alexandria.

That the defendant had been duly appointed, and was then collector, &c. The by-law of the Corporation of Alexandria of

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the 20th of March, 1830, for raising a revenue, &c., for the year 1830. That the Farmers Bank of Alexandria, was, at the time of passing the said by-law, and before and after, a bank established under the authority of the Acts of Congress of the 16th February, 1811, and March 2, 1821, and carrying on the banking business within the territorial limits and jurisdiction of the said common council. That he had duly demanded payment of the said tax, and that payment had been refused. That he was then required by the revenue laws of the common council to collect the taxes by distress and sale, &c., and that he took the said bank-notes as and for a distress for the tax of \$200. And it was agreed that, if upon that state of the case, the court should be of opinion that the said common council was not legally authorized and empowered to impose the said tax, judgment should be rendered for the plaintiffs for \$200; but if, &c., the common council had the power, &c., then judgment should be rendered for the defendant.

Mr. Swann, for the plaintiff. *Mr. Taylor*, for the defendant.

CRANCH, C. J., delivered the opinion of the Court, as follows :
(THRUSTON, J., absent.)

The original charter of the town of Alexandria, granted by Virginia on the 4th of October, 1779, gives the corporation power "to make by-laws and ordinances for the regulation and good government of the said town; provided such by-laws and ordinances shall not be repugnant to, nor inconsistent with the laws and constitution of the said Commonwealth; and to assess the inhabitants for the charge of repairing the streets and highways; to be observed and performed by all manner of persons residing within the same, under reasonable penalties and forfeitures, to be levied by distress and sale of the goods of the offenders for the public benefit of the said town."

The Act of 1748, for erecting the town, did not give the trustees any power to assess taxes; nor did the Acts of 1752, 1762, 1764, or 1772.

The Act of Virginia of 1796, authorized the corporation to recover the paving tax from non-resident proprietors of lots.

By the 5th section of the Act of Congress of the 25th of February, 1804, [2 Stat. at Large, 255,] amending the charter of Alexandria, it is enacted that "they" (the Common Council of Alexandria,) "shall have power to raise money by taxes for the use and benefit of the said town; provided that their by-laws shall not be repugnant to, or inconsistent with, the laws and Constitution of the United States."

The Act of Congress of May 13, 1826, [4 Stat. at Large, 162,] "further to amend the charter," provides for the sale of real

estate for the taxes thereon ; and "for the licensing, taxing, and regulating auctions, theatrical and other public shows and amusements."

The power given to the Corporation of Alexandria, by its amended charter, to raise taxes, is given in the most general terms, and without the least limitation as to the subject of taxation.

The faculty to carry on the banking business, seems to be as fair a subject of taxation as any other means by which money is to be acquired. It is the only mode by which the corporation can tax the stock of non-resident stockholders, who ought to contribute something to the expense of that protection of their property and their officers, which is afforded by the good regulations and sound police of the town.

There is, in the tax, nothing inconsistent with the laws or Constitution of the United States. The Farmers Bank is not (like the Bank of the United States,) necessary for the collection, safe-keeping, and transmission of the national revenues.

The power to tax, and the charter of the bank, are given by the same authority ; both emanate from the United States. If there should be danger that the Corporation of Alexandria would abuse its power to the destruction of the bank, the power may be taken from them, or restrained by Congress.

We are of opinion, that the Corporation of Alexandria has a right to tax the bank ; and that the judgment, on the case stated, should be for the defendant, with costs.



ANDREW BELL v. JAMES ENGLISH.

The Orphans' Court of Alexandria county, has authority and jurisdiction to bind out orphan children without indentures.

THE return of a writ of *habeas corpus*, to bring up a colored boy, was, that he was bound as apprentice to Mr. English, by the Orphans' Court of Alexandria county, to learn the business of a house-servant. The evidence of this binding was a copy of the record of the Orphans' Court, in these words :—

Orphans' Court, Alexandria county, October term, 1832.

Andrew Bell, a free orphan boy of color, who will be thirteen years old on the 25th of November next, is, by the court bound an apprentice to James English until he is twenty-one years of age, to learn the business of a house-servant ; which said business, in open court, the said James English agrees to teach the

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said apprentice, to furnish good board, clothing, washing, and lodging, and pay him \$20, freedom dues.

Witness, Chr. Neale, Esq., judge of the said Court, this 1st day of October, 1832. Test. A. Moore, Register of Wills.

Mr. Hewitt, for the petitioner, contended that the Orphans' Court cannot bind unless to some trade; and that house servant is no trade; and objected that no indentures were executed.

Mr. Hodgson, contra. The Virginia law says, "art, trade, or business."

The binding was in open court, and in the form always used in that court.

The COURT (*nem. con.*) refused to discharge the boy, being of opinion that the Orphans' Court had jurisdiction to bind out orphan children; and that the binding was in the usual form in which that court exercised its jurisdiction.

See *Hines v. Hewitt*, (*post*.) October term, 1834.

 UNITED STATES v. ADDISON BROWN.

A commitment not stating on its face any offence, is not evidence of a commitment for felony, although written on the back of a warrant of arrest charging a felony, but not referring to it.

INDICTMENT for breaking gaol, when committed for felony in stealing a saddle.

The commitment did not state any offence, but was written on the back of the warrant of arrest, which charged a felony. The commitment did not refer to the warrant of arrest.

The COURT (*nem. con.*) said, that it was no evidence of a commitment for felony.

Verdict, not guilty.

 UNITED STATES v. WILLIAM DAVIS.

Quære, whether an indictment will lie for assault and battery upon "a person unknown," not "unknown to the jurors."

INDICTMENT for assault and battery, "upon a person unknown," (not to the jurors unknown.)

Mr. Neale, for the defendant, moved in arrest of judgment, that the indictment was too uncertain.

The COURT, however, overruled the motion; CRANCH, C. J., doubting, because the only reason which can be admitted for not

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inserting the name of the person assaulted, is, that the person was unknown to the jurors; which is not averred; for the person might be unknown to the Attorney of the United States, who sent up the indictment, and might have been known to the jurors. The indictment might be true if the person assaulted was unknown by any person.

 UNITED STATES v. SUMMERS.

Peremptory challenge allowed, upon an indictment for stealing a slave, in Alexandria, D. C.

INDICTMENT for stealing a slave, the property of Mrs. Jenkins, under the Virginia statutes of 17 December, 1792, § 29, p. 190, and 25 January, 1799, p. 387, making it a felony punishable by death without benefit of clergy; and the Penitentiary Act of Congress, § 14, changing the punishment from death to penitentiary confinement and labor, [4 Stat. at Large, 448.]

A question was made whether he had a right to peremptory challenge, under the Virginia law of the 13th of November, 1792, § 8, p. 103.

The COURT (THRUSTON, J., *contra*,) allowed the peremptory challenge.

Verdict, not guilty.

But see *United States v. Hall*, at May term, 1843.

 UNITED STATES v. ALEXANDER TURLEY.

An indictment will not lie, under the Penitentiary Act, for an assault with intent to kill; there must be a battery also.

The want of the name of a prosecutor, written on the indictment, is not a good ground for arresting the judgment.

THE first count in the indictment was for simple assault and battery. The second count was for an assault with intent to kill Basil S. Hurdle.

Upon the first count the jury found the defendant guilty, and amerced him \$500.

Upon the second count they found him "guilty, by an attempt to kill Basil S. Hurdle."

Mr. Hewitt, for the defendant, moved in arrest of judgment,

1. Because the verdict on the second count is too vague, and

2. Because the name of a prosecutor was not written on the indictment.

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The COURT (*nem. con.*) arrested the judgment on the second count because the Penitentiary Act only punishes assault and battery with intent to kill, and this count is for assault only.

The Court, also, was of opinion that the objection for want of the name of a prosecutor was too late after verdict; but agreed to hear *Mr. Hewitt* again, upon that point, in *H. Lloyd's Cases*, (*post.*)

 UNITED STATES v. JOSEPH LARNED.

Quære, whether, in an indictment under the Penitentiary Act, for forging a "paper writing," it must not be averred to have been done "to the prejudice of the right" of some person; and whether upon an indictment for a felony, judgment may be rendered as for a misdemeanor; and whether, if the facts stated in the indictment do not amount to felony, the word "feloniously" may not be rejected as surplusage and judgment given as for a misdemeanor?

THE prisoner, who was convicted at the last term for feloniously forging, and uttering, &c., a certain paper writing, &c., (being a certificate of freedom,) was brought up and sentenced to the penitentiary, under the 11th section of the Penitentiary Act of March 2, 1831, [4 Stat. at Large, 448]; CRANCH, C. J., doubting, because the indictment does not charge it to have been done "to the prejudice of the right of any person, body politic," &c.; and because no statute in force here, makes it felony; and because judgment as for a misdemeanor cannot be given on an indictment for felony. *United States v. M'Carthy*, (*ante*, 304.) But *quære*, whether, if the facts stated in the indictment do not amount to felony, the word "feloniously" may not be rejected as surplusage, and judgment given as for a misdemeanor.

If the indictment does really charge a felony, I think the authorities are pretty clear that judgment cannot be given upon it, as for a misdemeanor.

See 1 Chitty, Cr. Pl. 195, 281, 286, 287, 289; Foster, 424; Cro. Jac. 607; 11 Co. 58; 2 Hale, 170; 2 Leach, 1107; Hawk. b. 2, c. 25, § 110; Bac. Ab. Indict. H. 2; Hard. 21; 8 T. R. 536; 2 East, Cr. L. 985, c. 19, § 58; 2 Hale, 192; 1 Hale, 449; 3 Chitty, Cr. Pl. 1022; 1 Chitty, Cr. Pl. 367, 368, 369; *Scholfeld's case*, 2 East, Cr. L. 1028; *Westbeer's case*, 2 Strange, 1137; *Joyner's case*, Kelyng, 29; 1 Chitty, Cr. Pl. 456, 638, &c.; 2 Hale, 172; 2 H. 7, 10, b.

 UNITED STATES v. HENRY THOMPSON.

To charge the prisoner, as for a second offence, an averment, that, on the 2d day of October, 1832, at a Circuit Court of the District of Columbia, for the county of

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Alexandria, the prisoner "was tried and convicted of larceny, as by the record of the said Court doth appear," without averring that the conviction was by judgment, and reciting the record of conviction, &c., is not a sufficient averment to justify the Court in sentencing the prisoner to the penitentiary, upon an indictment for stealing 55 cents.

THIS was a common indictment for stealing forty-three cents, and one silver coin of the value of twelve and a half cents. At the foot of which was the following addition. "And the jurors aforesaid further find, that, heretofore, to wit, on the second day of October, in the year of our Lord, 1832, at a circuit court of the District of Columbia, for the county of Alexandria, then duly sitting, the said Henry Thompson was tried and convicted of larceny, as by the said record of said court doth appear."

The COURT (THRUSTON, J., *contrà*,) was of opinion that this was not a sufficient averment to justify the Court in sentencing the prisoner to the penitentiary, as for a second offence, under the 13th section of the Act of the 2d of March, 1831, [4 Stat. at Large, 448.]

See 1 Hale, H. P. C. 324, 685, 686; 1 Hawk. c. 70, § 25; 3 Inst. 46, 172; 1 Chitty, Cr. Pl. 459, 460; 2 East, Cr. L. 919.

 UNITED STATES v. NEGRO JOHN.

A conviction for stealing a pocket-book is a conviction of stealing all that it contained, at the time of the theft, belonging to the same owner.

INDICTMENT for stealing a five-dollar bank-note.

The prisoner had been convicted, at this term, of stealing a pocket-book valued at ten cents, and sentenced. The bank-note was in that pocket-book, at the time it was stolen, and belonged to the same man, Francis Gray.

The verdict, in this case, was taken, subject to the opinion of the Court, on the question whether the former conviction of the prisoner, for stealing the pocket-book, is a bar to this prosecution, all matters, or points of law, reserved.

The COURT (*nem. con.*) rendered judgment for the prisoner.

CIRCUIT COURT OF THE UNITED STATES.

SEPTEMBER, 1833, AT WASHINGTON.

SPECIAL SESSION FOR THE TRIAL OF CRIMINAL CAUSES.

The Circuit Court of the District of Columbia cannot, at a special session for the trial of criminal causes, try a cause which was pending at the preceding stated session.

MEMORANDUM. A special session of the Circuit Court, in Washington county, for the trial of criminal causes, was holden on the 2d of September, 1833, by virtue of the following order, made at the last term, on the 29th of May, 1833.

“Ordered, that a special session for the trial of criminal causes, be held on the first Monday of September next, and that the marshal summon the usual number of grand and petit jurors;” and of the following clause of the 5th section of the Judiciary Act of 1789, [1 Stat. at Large, 73;] “and the circuit courts shall have power to hold special sessions for the trial of criminal causes, at any other time, at their discretion, or at the discretion of the Supreme Court;” and of the following clause of the Act of 2d of March, 1793; Ib. 333: “That any special session may be adjourned to any time or times previous to the next stated meeting of the circuit court; that all business, depending for trial at any special court, shall, at the close thereof, be considered, as of course, removed to the next stated term of the circuit court;” and the 8th section of the Act of the 13th of February, 1801, which provides, “That the said circuit courts,” (that is, the circuit courts by that act established,) “shall have power, and are hereby authorized, to hold special sessions for the trial of criminal causes, at any other time or times than is hereby directed, at their discretion;” and the 3d section of the Act of the 27th of February, 1801, [2 Stat. at Large, 89,] by which it is enacted, that “the said court,” (the Circuit Court of the District of Columbia,) and the judges thereof, shall have all the powers vested in the circuit courts, and the judges of the circuit courts of the United States.”

A question was suggested, whether prosecutions, commenced at the last stated term, can be continued to, and tried at, this special session; and whether process upon presentments made,

United States v. Jourdine.

and indictments found, at that term, can be made returnable to this.

The COURT (MORSELL, J., *contrâ*,) was, after argument, (in which the following cases were cited and considered, namely: *United States v. Hamilton*, 3 Dall. 18; *The United States v. The Insurgents of Pennsylvania*, 3 Id. 514; and *Cornell's case*, 2 Mason, 92, 100;) decidedly of opinion that the Court, at this special session, cannot try any cause which was pending at the last stated session.

 UNITED STATES v. ALFRED TAYLOR.

The dying declarations of the deceased, made in contemplation of death, may be given in evidence.

A new trial was granted, after conviction of murder, upon newly-discovered evidence, and the *venue* was changed.

INDICTMENT FOR MURDER. The dying declarations of the deceased were given in evidence against the prisoner, (*nem. con.*,) it having been proved that the surgeon had informed the deceased that he believed the wound to be mortal; and the deceased, having desired to see a priest, and declared he had received his death-wound. After conviction, upon newly-discovered evidence that the deceased had a dirk, and said, if it had not been for that, this affair would not have happened, a new trial was granted, and the trial removed to Alexandria, where the prisoner was found guilty of manslaughter.

 UNITED STATES v. HARRIET AND HENRIETTE JOURDINE.

Upon an indictment for keeping a disorderly house, and for keeping a bawdy house, the United States cannot give evidence of the general reputation of the house, nor of the general reputation of the defendants.

THE indictment had two counts: 1. For keeping a disorderly house. 2. For keeping a bawdy house.

The COURT (MORSELL, J., *contrâ*,) decided that the general reputation of the house could not be given in evidence by the Attorney of the United States. THRUSTON, J., having changed his opinion since the case of *Henry Gray*, at May term, 1826. [2 Cranch, C. C. 675.]

Mr. Key, for the United States, then offered evidence of the general character of the defendants, who resided in the house, and were the keepers thereof.

Mr. Brent and *Mr. Brice*, for the defendants, objected, that as a bawdy-house is defined to be a house of ill-fame kept for the resort and commerce of lewd people of both sexes, the characters of the keepers is not material. 1 Jac. Dict. tit. "Bawdy house."

The COURT (MORSELL, J., *contra*,) rejected the evidence.

The defendants were found guilty upon the first count only, and were fined \$20, and required to give security in \$200 for their good behavior for twelve months, and to stand committed until, &c.*

* The Court was in session twenty-five days. One hundred and twenty-four indictments were found. No cases were tried but upon indictments found at this special session. Fifty-nine were tried; five pleaded guilty. Of those tried forty-five were found guilty; eleven not guilty; and in three the jury could not agree, and were discharged. Sentence was pronounced in forty-four cases, and several new trials were granted; one of which was a case of murder. The Court transacted all the business which was ready, and, having ordered all the unfinished business to be continued to the next regular term, adjourned to the Court in course, October 1, 1833.

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1833, AT WASHINGTON.

BETTINGER *v.* RIDGWAY.

In the administration of the estate of a deceased person, in Washington county, D. C., a judgment of a justice of the peace is not on a par with the judgments of a court of record; and is not entitled to priority of payment out of the assets.

This was an appeal from the Orphans' Court for the county of Washington, which had decided that the judgment of a justice of the peace is entitled to priority of payment, and is upon a par with the judgments of a court of record.

By the Maryland law of 1798, ch. 101, c. 8, § 17, "Judgments and decrees against the deceased shall be wholly discharged before any part of other claims." "But no executor or administrator shall be bound to discover what judgments have been passed against the deceased, unless in the high court of chancery or the general court of the shire, or the court of the county where the deceased last resided." *Id.* ch. 101, c. 9, § 1. "The voucher, or proof, of a judgment or decree, shall be a short copy thereof, under seal, attested by the clerk or register of the court where it was obtained, who shall certify that there is no entry or proceeding in the court to show that the said judgment or decree hath been satisfied."

The difficulty which an administrator must have in ascertaining what judgments have been rendered before justices of the peace, (of which there is no record, technically speaking,) and of which, the justices in Maryland, in 1798, did not keep dockets, so as to avoid a *devastavit*; and such judgments being only *primâ facie* evidence of debt, liable to be disputed upon the plea of *nil debit*, affords strong ground to believe that the legislature did not contemplate such judgments when they were passing the Testamentary Act of 1798.

This belief is corroborated by the nature of the voucher which the plaintiff must produce to the Orphans' Court, and which it is impossible to procure of a justices' judgment.

For these reasons the Court is of opinion, (*nem. con.*) that the sentence of the Orphans' Court should be reversed.

UNITED STATES v. JEMIMA STEVENS.

Upon a count for keeping a disorderly house, charging that the defendant suffered persons of ill fame to come together, &c., evidence may be given of the general reputation of such persons. And the same evidence is admissible upon a count for keeping a bawdy house.

THE indictment had two counts: 1. For keeping a bawdy-house. 2. For keeping a disorderly house.

The COURT permitted evidence to be given of the general reputation of the persons who visited the house, in support of the averment in the second count, that the defendant suffered persons of ill fame to come together, &c.; and also of the averment in the first count, that the defendant suffered evil-disposed persons, &c., to commit fornication, &c.

The following cases and authorities were cited. 2 Russell, 682, 683; *Commonwealth v. Stewart*, 1 Serg. & R. 342; Archbold, 362; 2 Ld. Raym. 1197; 2 Chitty, 39, note; 2 Burr. 1293; 3 Chitty, 674; 2 Atk. 339, &c.

 PHILIP HAUPTMAN v. ARTHUR NELSON.

A discharge under the insolvent law of the District of Columbia, does not affect the rights of a non-resident creditor, unless the debtor be confined at his suit at the time of the discharge, and special bail will be required notwithstanding such discharge.

Mr. Hall moved the Court to permit him to appear for the defendant without bail, because the defendant had been discharged under the insolvent law of this district since the cause of action accrued.

Mr. Brent, for the plaintiff, stated that the plaintiff was not a resident of the District of Columbia, and was not the creditor at whose instance the defendant was confined. See the Act of May 6, 1822, entitled "An Act for the relief of certain insolvent debtors." [3 Stat. at Large, 682.]

Mr. Hall, in reply, contended that that act applied only to non-resident debtors who might be arrested and confined here. That the proviso does not extend beyond the evil intended to be remedied, which was that non-resident defendants had not the benefit of the Act of 1803. The Act of 1822 gives them the benefit, but with a proviso that the discharge shall not operate against any creditor residing out of the limits of the District of Columbia, except the creditor at whose instance the debtor may be confined.

But the COURT (THRUSTON, J., absent,) said that the proviso goes further than the case stated in the clause repealed, and ex-

pressly provides, that "no discharge under this act or the act of which it is amendatory, shall operate against any creditor residing without the limits of the District of Columbia, except the creditor at whose instance the debtor may be confined."

The words being positive, and extensive enough to take in the present case, the Court cannot limit them so as to exclude it. The Court had before decided the point in the same way, in several cases.

SAMUEL STETTINIUS v. W. C. ORME.

It is not a valid objection to an affidavit to hold to bail in slander, that the plaintiff therein states that he is credibly informed and verily believes that the defendant spoke the words; the affidavit being positive that the plaintiff had sustained damage thereby to the amount of \$5,000.

SLANDER. Affidavit filed with the declaration before the writ was issued.

Mr. Wallach moved for leave to appear without bail, because the affidavit was not positive that the defendant spoke the words charged.

But the affidavit was deemed sufficient by the COURT, (THRUSTON, J., absent,) although it only stated that the plaintiff was credibly informed and verily believed that the defendant spoke the words; the affidavit being positive that the plaintiff had sustained damage by the speaking of the words to the amount of \$5,000.

UNITED STATES v. ELIZA WARNER.

Upon an indictment for keeping a disorderly house, and for keeping a bawdy house, the United States cannot give evidence of the general character of the defendant.

THE indictment had two counts. 1. For keeping a bawdy house. 2. For keeping a disorderly house.

Mr. Dunlop, for the United States, offered evidence of the general character of the defendant.

Mr. Z. C. Lee, for the defendant, objected, and relied on the decision of this Court in *United States v. Jourdine*, at the September Special Court, 1833, (*ante*, 338.)

Mr. Dunlop, contra, cited 1 Hawk. c. 74.

The COURT (MORSELL, J., *contra*,) refused to permit the evidence to be given.

Verdict, not guilty.

*Ex parte Williams.**Ex parte THOMAS WILLIAMS.*

No person can be detained upon a commitment which does not show sufficient cause upon its face.

There is no law in the county of Washington, to justify the commitment of a man to hard labor by a justice of the peace, for playing at cards, even if he be a free black or mulatto, and unable to pay the fine imposed on him by the justice.

The 8th section of the by-law of 31st May, 1827, is not, so far as it authorizes a commitment to the work-house for the non-payment of a fine, warranted by the charter, except in the case of the nightly and other disorderly meetings of slaves, free negroes and mulattoes, who are unable to pay the fine.

By the 8th section of the charter, the only persons who may be confined to labor for not paying a fine are free negroes, or mulattoes, who are unable to pay such penalty.

Confinement to labor is a severe proceeding, and should be strictly confined to the case in which alone it is authorized by the charter.

The power was not originally given as a substituted punishment in lieu of the penalty, but as the means of obtaining payment of the penalty.

In case of inability to pay, he is to give an equivalent in labor.

The corporation had no authority to compel a person to labor, who was able and refused to pay.

The by-law which attempts to give authority to a justice to commit the defendant to labor for a refusal to pay, is not warranted by the charter.

A commitment under the by-law, must charge that the offence was committed by a free black or mulatto.

HABEAS CORPUS, to Richard Butts, intendant of the Washington Asylum, commanding him to bring up the body of Thomas Williams, with the cause, &c. to do and submit, &c.

Upon the return it appeared that the said Thomas Williams was detained by virtue of the following warrant:—

“District of Columbia, county of Washington, to wit. To Richard Butt, intendant of the Washington Asylum, greeting. Whereas the mayor, board of aldermen, and board of common council of the city of Washington, recovered judgment for \$10 fine, and \$1.58½ cents costs, against Thomas Williams, for playing at cards, &c., before Robert Clarke, Esq., a justice of the peace for the county aforesaid, on the 26th day of July, 1833, and the said Thomas Williams refuses to pay or satisfy the aforesaid judgment;

“You are therefore commanded to take into your custody the body of the said Thomas Williams, and him keep at hard labor into the penitentiary department of the Washington Asylum, thirty days, until he shall be otherwise discharged by due course of law. Hereof fail not. Given under my hand and seal, this 22d day of October, 1833. John D. Clarke. [L. s.] To John Waters, a constable, of Washington county.”

CRANCH, C. J., delivered the opinion of the Court, (THRUSTON, J., *contrà*.)

The by-law under which this prosecution is supposed to have

been instituted, was passed on the 31st of May, 1827, (§ 4 and 8) entitled "an act concerning free negroes, mulattoes, and slaves."

By the 4th section it is enacted, "that if any free black or mulatto person shall be found playing at cards, dice, or any other game of an immoral tendency, or shall be present as one of the company where such game is playing, on conviction thereof, before a justice of the peace, shall forfeit and pay a fine not exceeding \$10."

By the 8th section it is enacted, "That any free black or mulatto person, who shall be fined under any of the provisions of this act, on refusing or neglecting to pay, or secure to be paid, such fine, shall be committed to the work-house, until such fine be paid, for any period of time, not exceeding six months."

The Act of Congress of the 15th of May, 1820, [3 Stat. at Large, 583,] ("To incorporate the inhabitants of the city of Washington, and to repeal all acts," &c.) among other powers gives the corporation (by the 7th section,) power "to restrain or prohibit" "all kinds of gaming," and "impose and appropriate fines, penalties, and forfeitures, for the breach of their laws or ordinances;" and by the 8th section, "to establish and erect work-houses, houses of correction, penitentiary, and other public buildings;" "to restrain and prohibit the nightly and other disorderly meetings of slaves, free negroes, and mulattoes, and to punish such slaves by whipping, not exceeding forty stripes, or by imprisonment not exceeding six months for any one offence; and to punish such free negroes and mulattoes, by penalties not exceeding \$20 for any one offence; and in case of the inability of any such free negro or mulatto to pay any such penalty and cost thereon, to cause him or her to be confined to labor for any time, not exceeding six calendar months;" "to punish, corporally, any colored servant or slave for a breach of any of their ordinances, unless the owner or holder of such servant or slave shall pay the fine in such cases provided; and to pass all laws which shall be deemed necessary and proper for carrying into execution the powers vested by this act, in the said corporation or its officers."

By the 9th section it is enacted, "that the marshal of the District of Columbia shall receive and safe keep within the jail for the county of Washington, at the expense of the corporation, all persons committed thereto under, or by authority of the provisions of this act. And in all cases where suit shall be brought before a justice of the peace, for the recovery of any fine or penalty arising or incurred for the breach of any law or ordinance of the corporation, execution shall and may be issued as in other cases of small debts."

Ex parte Williams.

By the law of the 5th of April, 1821, § 12, it is enacted, "That at the asylum there shall be a separate apartment or apartments for the reception of vagrants and persons committed for offences against the laws of the corporation. And the intendant of the asylum, under the directions of the guardians of the poor, shall have the care of all such vagrants, and persons committed as aforesaid, and shall keep them employed in some useful work."

The by-law of the 5th of July, 1821, speaks of the work-house and the penitentiary department of the Washington asylum as the same place.

A temporary work-house had been provided by the by-law of the 15th of November, 1813, for the reception of such persons as should be committed under the Act of the 16th of December, 1812; and the mayor was to appoint some fit person to be styled "superintendent of the work-house," whose duty it should be "to superintend the work-house and persons committed to his charge, and keep such persons at hard labor, for and during the term for which they shall have been committed." In the third section of the same by-law it is called, "said penitentiary."

The by-law of the 6th of April, 1815, suspends the use of the temporary work-house, and the duties of the superintendent ceased. A part of the poor-house was ordered to be fitted up for the same purpose and put under the care of the superintendent of the poor-house, who was required to keep the prisoners at hard labor.

In the seventh and eighth sections of the same by-law it is called "the said penitentiary or poor-house."

In the by-law of the 25th of June, 1818, it is called "the temporary penitentiary or work-house," and it is made a "part of the poor-house establishment." And the by-law of the 14th of April, 1821, calls it, "the work-house."

Upon the whole, it seems probable that "the work-house" mentioned in the eighth section of the by-law of the 31st of May, 1827, was the apartment or apartments in the asylum directed to be prepared, by the twelfth section of the by-law of the 5th of April, 1821, c. 124, and which, in the by-law of July 5th, 1821, is called "the penitentiary department of the Washington asylum."

A commitment, therefore, "to the penitentiary department of the Washington asylum," was a commitment to the work-house, within the meaning of the eighth section of the by-law of May 31st, 1827.

No person can be detained upon a commitment which does not show sufficient cause upon its face.

There is no law, in this county, to justify the commitment of a

Ex parte Williams.

man to hard labor by a justice of the peace for playing at cards, even if he be a free black or mulatto, and unable to pay the fine imposed on him by the justice.

The eighth section of the by-law of 31st of May, 1827, is not, so far as it authorizes a commitment to the work-house for non-payment of a fine, or penalty, warranted by the charter, except in the single case of the nightly and other disorderly meetings of slaves, free negroes, and mulattoes, who are "unable" to pay the fine or penalty.

By the eighth section of the Charter of 1820, the only persons who may be confined to labor, for not paying a fine or penalty, are free negroes or mulattoes who are unable to pay "such penalty." The penalty meant is the penalty incurred by "such free negroes and mulattoes," as shall be guilty of the nightly and other disorderly meetings, which the corporation is, in the same sentence, authorized to restrain and prohibit. By the same section power is given to the corporation "to restrain and prohibit the nightly and other disorderly meetings of free negroes and mulattoes;" "and to punish such free negroes and mulattoes by penalties not exceeding twenty dollars for any one offence;" (that is, the offence of disorderly meeting.) "And in case of the inability of any such free negro or mulatto," (that is, the free negro or mulatto who has incurred the penalty for a disorderly meeting,) "to pay any such penalty," (that is, the penalty for a disorderly meeting,) "and costs thereon," "to cause him or her," (that is, the free negro or mulatto who had incurred the penalty for the disorderly meeting, and is unable to pay it,) "to be confined to labor for any time, not exceeding six calendar months."

Confinement to labor, in lieu of a pecuniary penalty, is a severe proceeding, and should be strictly confined to the case in which alone it is authorized by the charter. The power was not originally given as a substituted punishment in lieu of the penalty, but as the means of obtaining payment of the penalty, as is apparent from the provision of the Act of Congress of the 4th of May, 1812, [2 Stat. at Large, 721,] "further to amend the charter," and which continued in force until the new charter was granted in 1820.

The words of that act are, "To restrain and prohibit the nightly and other disorderly meetings of slaves, free negroes, and mulattoes;" "and to punish such free negroes and mulattoes for such offences by fixed penalties not exceeding twenty dollars for any one offence; and in case of the inability of any such free negro or mulatto to pay and satisfy any such penalty and costs thereon, to cause such free negro or mulatto to be confined to labor, for such reasonable time, not exceeding six calendar months, for any one offence, as may be deemed equivalent to such penalty, and

costs ;" that is, that, in case of inability to pay, he was to give an equivalent in labor.

The word inability, in both charters, contains an important restriction of the power to sentence the offender to labor. If the defendant was able to pay the penalty, it might be recovered, (without resorting to this severe remedy,) by *fieri facias*, or by simple imprisonment upon a *ca. sa.* to compel a surrender of his property.

The corporation had no authority to compel a person to labor who was able and refused to pay ; or merely because he refused to pay. The by-law, therefore, which attempts to give authority to the justice to commit the defendant to labor, merely for a refusal to pay, is not warranted by the charter, and is void as to the power to commit to labor for any of the offences described in that by-law.

In the case of vagrants, and keepers of public gaming-tables, who may be required to give security for their good behavior, the charter has provided for the case of their refusal, as well as for their inability to give it. Its omission to do so in the case of disorderly meetings of free negroes, &c., is evidence of a different intention as to them.

But not only is the by-law not warranted by the charter, but the commitment does not describe any offence under the by-law. It does not state that the defendant was a free negro or mulatto, to whom alone the by-law is applicable. It states the offence to be "playing at cards," &c., but that is no offence for which the party may be confined to labor, unless committed by a free black, or mulatto ; a fact not stated in the description of the offence charged in the warrant.

For these reasons a majority of the judges think the prisoner ought to be discharged.

JAMES KENNEDY v. JOHN B. GORMAN.

A *certiorari* will lie from the Circuit Court, D. C., to a justice of the peace who is proceeding in a case in which he has no jurisdiction. It will issue, upon the affidavit of the defendant. It is the proper writ when a justice of the peace usurps a jurisdiction which belongs exclusively to this Court. If the justice has no jurisdiction in the case, his proceedings are absolutely void, and this Court will proceed to try the cause according to law.

THE defendant Gorman, obtained a *certiorari*, upon his own affidavit, directed to John Chalmers, Esq., a justice of the peace, to bring up a cause depending before him, in which James Kennedy was plaintiff, and the said John B. Gorman, defendant.

Upon the return it appeared that the suit was upon a prison-bonds bond in the penalty of \$100 ; and that the debt due upon the bond amounted to \$54.16, which exceeded the jurisdiction of the justice, and that he had rendered judgment upon the verdict of a jury before the *certiorari* was served.

Mr. Giberson, for the plaintiff, moved to quash the writ of *certiorari*, on the ground that this Court had no power to issue it.

Mr. Bradley, contra, cited *Tidd*, 399, 414, 416.

CRANCH, C. J., delivered the opinion of the Court (*nem. con.*)

It appears that the sum to be recovered, under the penalty of this bond, was \$54.16, which exceeds the jurisdiction of the justice.

This Court having the same powers as the other circuit courts had at the time when this Court was established, has power to issue all writs necessary to the exercise of its jurisdiction, and agreeable to principles and usages of law. When a justice of the peace, in any particular case, usurps a jurisdiction exclusively vested in this Court, some writ is necessary to enable this Court to exercise its jurisdiction in that case. When such a case occurs, this Court has no means of ascertaining whether it be a case exclusively within its jurisdiction, but by an examination of the proceedings of the justice ; and that cannot be done unless his proceedings are brought before the Court ; and this can only be done, agreeably to the principles and usages of law, by a writ of *certiorari*. The writ, therefore, has properly issued upon the suggestion contained in the petition and verified by affidavit. The proceedings of the justice are now before us, by which it appears that the amount of debt and damages, at the time the cause was before him, exceeded the sum of \$50, whether we consider the penalty of the bond, or the amount recoverable under its condition.

But it appears also that the justice had rendered judgment before he was served with the writ of *certiorari*. What, then, is this Court to do ? Remand the cause to the justice with a *procedendo* ; or, considering the judgment as absolutely void because *coram non judice*, shall the Court proceed to try the cause in the same manner as if the defendant had been brought before the Court by the usual process of *capias ad respondendum* ?

If it had appeared by the petition and affidavit that the cause was within the jurisdiction of the justice, it would equally have appeared not to be within the jurisdiction of this Court, and the writ of *certiorari*, therefore, would not have been necessary or proper ; for in that case we could only exercise an appellate jurisdiction, and in the mode pointed out by law. And if the same had appeared upon the return of the *certiorari*, this Court must have awarded a *procedendo*.

Stettinius v. Myer's Administrator.

But in the present case this Court had and has original jurisdiction. The judgment of the justice was *coram non judice* and void ; and this Court must proceed to try the cause according to law ; and if the defendant has appeared, the plaintiff may file his declaration, and proceed as in other causes of the like nature.

HUNGERFORD v. R. R. BURR.

Upon the plea of no rent-arrear, in replevin, the whole burden of proof is on the party pleading it.

REPLEVIN. Avowry for rent-arrear. Plea, no rent-arrear.

Mr. Wallach, for the defendant, contended that the burden of proof was on the plaintiff, to show that he had paid the rent ; the plea admits every thing necessary, namely, the demise, the tenancy for the time, and the amount of rent accruing for the time. 4 Stark. on Ev. 1297 ; *Alexander v. Harris*, 4 Cranch, 304.

The COURT (*MORSELL, J., contra*,) was of opinion that the whole burden of proof was on the plaintiff.

MORSELL, J., was of opinion that the defendant must give some slight evidence of the arrears. 2 Saund. on Pleading, 763 ; 2 Esp. Rep. 669.

SAMUEL STETTINIUS v. B. F. MYER'S ADMINISTRATOR.

The plaintiff may, at the trial, after the jury is sworn, strike out the second and third blank indorsements of the note, and fill up the first blank indorsement to himself. In an action for goods sold at auction, for cash, the defendant may set off the plaintiff's note.

ASSUMPSIT for goods sold at auction ; terms cash.

The defendant pleaded in offset a promissory note of the plaintiff to Davidson, and indorsed by him and two others all in blank.

Mr. Morfit, for the plaintiff, objected that the defendant's title to the note was not complete ; and cited *Day v. Lyon*, 6 Har. & Johns. 140.

Mr. Marbury, for the defendant, contended that he had now a right, after the jury was sworn, to strike out the blank indorsements of the subsequent indorsers and their names, and to fill up the blank indorsement of Davidson, the first indorser, so as to make the note payable to Myers ; and of that opinion was the whole Court.

Nixdorff v. Wells.

Mr. Morfit then contended that as the sale of the goods by the plaintiff to Myers was at auction, and the terms of sale cash, the defendant could not set off the note of the plaintiff; and of that opinion was *THRUSTON, J.*

But the COURT (*THRUSTON, J., contra*,) overruled the objection. *THRUSTON, J.*, afterwards agreed with the Court, upon seeing the case of *Eland v. Karr et al.*, 1 East, 375.

JAMES CRAMPTON v. JOHN P. VAN NESS.

The want of title in fee in the plaintiff is no bar to an action for rent, upon a lease for seven years, with leave to purchase the fee-simple within that term.

• *APPEAL* from the judgment of a justice of the peace who gave judgment for a half year's rent, upon a lease for seven years, with leave to the tenant, within that term to purchase the fee-simple upon payment of \$480.

Mr. Bradley, for the appellant, contended that the defendant is not bound, in equity, to pay the rent, because the plaintiff has not a good title in fee. *Kirtland v. Pounset*, 2 Taunt. 145; *Smith v. Stewart*, 6 Johns. 46.

But the COURT (*nem. con.*) decided that it is no defence, the defendant not having been evicted.

BARBARA NIXDORFF v. RICHARD WELLS.

To enable a landlord to recover double rent for holding over, the lease must be for a specific term.

A renting at \$60 a year, payable monthly, is not for a specific term, and will not authorize a judgment for double rent.

APPEAL from a justice of the peace, who gave judgment for \$10, being double rent for a month, the tenant having held over after the first year, under a demise at \$60 a year, payable monthly.

Mr. Marbury, for the appellee. No time for notice to quit is mentioned when the lease will expire by its own limitation. *Woodfall, L. & T.* 163. A renting at \$60 a year, payable monthly, is a renting for one year and no more.

Mr. Redin, contra. It was a general hiring at \$60 a year, not for any limited period. The case of *Gordon*, in this Court, at the last term, was a specific lease for one year only, and notice to quit was not necessary to recover double rent.

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The COURT (*nem. con.*) was of opinion that the renting was not clearly shown to be for a specific term, but only at the rate of \$60 a year, leaving the term uncertain; and that double rent could not be recovered.

Judgment reversed, with costs.

THEODORE ROBY, by his next Friend, v. THOMAS LYNDALL.

An infant, after the death of his father, cannot recover his wages for services performed in the lifetime of his father, under a contract made with the father, who has a right to dispose of his earnings, or any part thereof.

The father had assigned to the defendant a right to receive, to his own use, one half of the boy's wages, in consideration of the defendant's engaging to teach him the use of carpenter's tools; and the defendant had received the same; held, that the boy could not recover it in an action for money had and received.

It makes no difference that the services were performed for the United States, and in their navy-yard.

ASSUMPSIT, for \$395.60, money had and received to the use of the infant plaintiff.

The plaintiff was employed by the United States to work in their navy-yard, at Washington, at the rate of 44 cents a day, under an agreement with his father, who had agreed with the defendant, (who was superintendent of the ship-joiners department,) to assign to him, to his own use, one half of the son's wages, in consideration of the defendant's agreeing to teach the boy the use of carpenter's tools; which half of the wages the defendant received, up to the death of the father, in April, 1832. This suit was commenced in November, 1832, to recover the half of the wages thus received by the defendant.

Mr. R. S. Coxe, for the defendant, contended, that only the father, or his assignee, and not the son, had a right to receive the wages; and prayed the Court to instruct the jury, "that, if they should find, from the evidence, that the money retained by the defendant was part of the wages of the boy, during his minority, and in the lifetime of his father, and was so retained, by the consent of the father, the plaintiff could not recover in this action."

Mr. Morfit, contra. The father has no right, at common law, to the earnings of his infant son, unless he maintains him, and then, only to the value of the maintenance; and the father, by taking only 22 cents a day, acknowledges that to be a sufficient compensation for the maintenance.

Mr. Hellen, on the same side. If a minor be in the employ of the United States, he has a right to his own wages. Infants may exercise public offices, except judicial, and are entitled to the profits thereof, and may contract with the government, in relation

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to the same. Bingham on Infancy, 72. A cabin-boy, in a public ship, receives his own wages. The father of an infant partner is not entitled to his share of the profits. An infant payee may indorse a note and transfer the right of action to the indorsee. Lyndall, the defendant, could not lawfully make such a contract. He was in the employ of the United States, and the contract was against public policy, because it creates an interest in the defendant adverse to that of the United States, and inconsistent with his duty. The defendant was superintendent of the ship-joiners department, and his duty would be to discharge the boy if he did not behave well, but his interest would be to continue him in service.

Mr. Coxe, in reply. The doctrine of the common law is universal, that the father is bound to support his child, and is entitled to all his earnings. Reeve on Domestic Relations, c. 9, pp. 283, 290; *United States v. Bainbridge*, 1 Mason, 71; 1 Bl. Com. c. 16, pp. 447, 448; 2 Kent's Com. 189; 1 Chitty's Bl. 448, 452, note 3.

The COURT (THRUSTON, J., *contra*,) gave the instruction as prayed by *Mr. Coxe*.

THRUSTON, J., was of opinion that the bargain between the father and the defendant was fraudulent, and against public policy; and that therefore the plaintiff could recover.

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CORPORATION OF WASHINGTON, Appellant, v. JOHN H. EATON, Appellee.

An appeal to the Circuit Court of the District of Columbia, for the county of Washington, lies from the judgment of a justice of the peace, for the penalty of a by-law of the corporation of Washington.

A justice of the peace, for the county of Washington, has jurisdiction of offences against the by-laws of the corporation of Washington, although the amount of the penalty be discretionary, within certain limits.

That discretion does not deprive the party of his right of appeal.

The power given by Congress to the corporation of Washington, to pass by-laws for the government of the city, is not a delegation of the power of exclusive legislation given to Congress by the Constitution of the United States.

The power given by the charter, to the corporation, "to prevent and remove nuisances," and "to provide for the prevention and extinguishment of fires," authorized the corporation to pass the by-law of the 30th of March, 1813, against any person who shall "fire or shoot a gun, pistol, or other fire-arm, idly, or for sport or amusement, within 250 yards of any dwelling-house," or within certain limits therein described.

A *qui tam* action will not lie for the penalty of that by-law.

It is not necessary that the order for the appeal should be given under the corporate seal.

It is not necessary that the justice who takes cognizance of the case, should be one of those appointed under the 6th section of the by-law of November 8, 1830.

It is not necessary that it should appear upon the proceedings before the justice, that

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the by-law had been published five days in some newspaper, by authority of the corporation.

The ten days' notice required by the 7th section of the Act of Congress of March 1, 1823, was for the benefit of the appellant, not of the appellee.

THIS was an appeal from the judgment of a justice of the peace for the county of Washington, in favor of the appellee, upon a warrant for the penalty of ten dollars for firing a pistol, "idly and for sport and amusement," within certain limits prohibited by the by-law of the corporation of Washington of the 30th of March, 1813.

Mr. Eaton, in proper person, moved the Court to dismiss the appeal, and contended that this was a criminal prosecution, of which the justice had no cognizance; his jurisdiction being limited to civil cases of debt or contract. That the penalty being discretionary, namely, not less than five, nor more than ten dollars for each offence, no action of debt will lie for it, because there was no certain debt upon which to found the action. That he was entitled to ten days' notice of the judgment in his favor, before the commencement of this term, or he was not bound to answer; according to the seventh section of the Act of Congress of March 1, 1823, [3 Stat. at Large, 743,] extending the jurisdiction of the justices of the peace. That the appeal was ordered by the mayor only; but the order ought to have been under the corporate seal.

That Congress had no authority to give the corporation power to make by-laws. That Congress are to exercise exclusive legislation, and could not delegate any part of it; but if they could, the corporation can exercise only the part delegated; and no power has been given to the corporation to prevent firing pistols in the city. That the distribution of the penalty, when recovered, is uncertain. It is given to the corporation and the informer. It should have been a *qui tam* action. That where the discretion of the justice is to be exercised, there can be no appeal; his judgment is conclusive. 1 Paley's Summary Convictions, 268.

That it does not appear by the record that *Mr. Waters*, the justice who took cognizance of the case, was one of the justices designated according to the provisions of the by-law of November 8, 1830, as magistrates to enforce the by-laws; and that it does not appear by the record that the by-law had been published five days before the offence.

Mr. R. S. Coxe, for the corporation, as to the exclusive legislation, referred to the "Federalist." As to the power to prohibit the discharge of fire-arms, idly, and for amusement, in the streets, &c., it is included in the power "to prevent and remove nuisances," and "to prevent and extinguish fires."

This is not a criminal prosecution; it is a civil action of debt

for a penalty. It is not necessary that the amount should be ascertained before the commencement of the suit. Debt will lie for a penalty to be ascertained by a jury or by a judge. *Bullard v. Bell*, 1 Mason, 243; *United States v. Colt*, 1 Peters, C. C. R. 145; *Pemberton v. Shelton*, Cro. Jac. 498; *United States v. Lyman*, 1 Mason, 482; *Smith v. Jackson*, 1 Paine, 453.

The appeal lies, although the penalty is to be imposed according to the discretion of the justice. The decision of the justices is conclusive as to the amount of the penalty, if within the limits of the law; but if he refuses to give judgment for any fine, or beyond the limits prescribed, it is error, and his judgment may be reviewed. If an appeal lies, this Court has all the power which the justice had.

It was not necessary that the mayor should have given the order to appeal, much less that it should be under the corporate seal. The attorney for the corporation had a right to appeal.

As to the designation of the magistrates to enforce the by-laws, the by-law of November 8, 1830, is only directory; it does not deprive the other justices of their concurrent jurisdiction. It is not necessary that it should appear in the record that the justice was one of the designated justices, or that the by-law had been published five days before the offence.

A *qui tam* action is a statutory action. It is not a common-law right by which any man may sue for the king. It cannot be maintained unless expressly given by statute. But when it is given, the king may sue alone, unless the statute limits the remedy to a *qui tam* action. It will not lie by the corporation and an informer.

Mr. Kane, of New York, in reply. The discretion is given to the justice alone. This Court cannot execute it.

The general principle is, that no appeal lies from the discretion of an inferior court. It is only upon *mandamus* that the discretion of the inferior court can be questioned. *Bates v. Knight*, 3 T. R. 442. Appeal only lies in cases of debt or civil demand. The by-law does not give an appeal. *Boothe v. The Corporation of Georgetown*, in this Court, at October term, 1823, (2 Cranch, C. C. 356,) and *Howard v. United States*, (2 Cranch, C. C. 259.)

CRANCH, C. J., delivered the opinion of the Court, as follows, (THRUSTON, J., dissenting.)

Appeal from a justice of the peace who had given judgment against the corporation upon a warrant issued against the appellee for a penalty of ten dollars for firing a pistol, idly, and for sport and amusement, within certain limits in the city of Washington, contrary to the by-law of the 30th of March, 1813, which declares, that "the person so firing or shooting, shall forfeit and pay a fine

not exceeding ten dollars, nor less than five dollars, at the discretion of any justice of the peace resident within this city; one third whereof shall be for the use of the city; one third for the use of the constable, and the remaining third for the use of the informer," &c.

A motion has been made by the defendant to dismiss the appeal, upon the ground that no appeal lies in such a case.

1. It is said that this is a criminal prosecution, and that no appeal lies unless it be expressly given by some statute.

But this is a suit for a penalty, given by a by-law of the corporation of Washington, enacted under the authority of its charter, which authorizes the recovery by suit before a justice of the peace, "as in all other cases of small debts."

By the seventh section of the first charter of 1802, [2 Stat. at Large, 195,] which was continued in force by the Acts of the 24th of February, 1804, [Ib. 254,] and 28th of February, 1820, [3 Ib. 543,] until the 15th of May, 1820, when the present charter was granted, it is enacted, "that all fines, penalties, and forfeitures imposed by the corporation of the city of Washington, if not exceeding twenty dollars, shall be recovered before a single magistrate, as small debts are by law recoverable; and if such fines, penalties, and forfeitures, exceed the sum of twenty dollars, the same shall be recovered by action of debt in the District Court of Columbia for the county of Washington, in the name of the corporation, and for the use of the city of Washington."

Although the Act of 1802 is repealed by the Act of the 15th of May, 1820, [3 Stat. at Large, 583,] which constitutes the present charter, yet it is evident that the legislature intended that the former mode of recovering fines and penalties under the by-laws of the corporation, should remain. For, by the ninth section of the new charter it is enacted, that "in all cases where suit shall be brought before a justice of the peace for any fine or penalty arising or incurred for a breach of any law or ordinance of the corporation, execution shall and may be issued, as in all other cases of small debts." It is clear that the legislature considered a fine or penalty incurred for a breach of a by-law of the corporation, as a small debt, and treated it as such, so far as regards the mode of recovery. They have not considered it as a criminal prosecution, but have clothed it entirely in a civil vesture, associated it with other small debts, and given the same course of procedure for its recovery.

The justice of the peace has the same jurisdiction of a suit for the penalty of a by-law as of a suit for any other debt. He takes it subject to the same right of appeal. The law makes no distinction between them. It is true, that the Act of Congress of the 1st of March, 1823, [3 Stat. at Large, 743,] extending the jurisdic-

tion of justices of the peace to cases of \$50 value, only speaks of debt and damages; and of debtor and creditor, and has been construed to refer only to cases of contract; but it is not that act which gives jurisdiction in the present case, although it gives the mode of procedure. The jurisdiction is given by the charter. In all cases in which the justice has jurisdiction, if the value exceed \$5, the Act of 1823, gives a right of appeal; and it is not material from what source the justice derived his jurisdiction.

From 1802, (the date of the first charter,) until the present time, the penalties arising under the by-laws of the corporation, have been recovered before a justice of the peace, and appeals to this court have been constantly allowed and sustained.

2. But, it is said, that in this case the penalty was uncertain; it might be any thing between five and ten dollars, and therefore it was not a debt; and cases were cited to show that debt would not lie for an uncertain sum. Those cases, however, go entirely upon the form of action, to wit, whether it should be an action of debt, or an action of *assumpsit*. But in proceedings before a justice of the peace, those technical distinctions do not exist, and the question whether the form of action should be debt or *assumpsit*, cannot arise. The uncertainty of the sum to be recovered, is no objection to the recovery in some form of action. Upon a suit brought for \$10, the corporation may recover \$5, or any intermediate sum which the justice, in his discretion, may adjudge; and an action of debt would lie for it, although the sum to be recovered should be uncertain at the commencement of the suit, and to be ascertained only by the verdict of the jury, or the discretion of the judge. It is true, that in an action of debt, the plaintiff must demand a certain sum; but he may recover less than he demands, as in the case of *Pemberton v. Shelton*, Cro. Jac. 498, cited in the argument, where an action of debt was brought for £33, the alleged treble value of tithes which the defendant had failed to set out according to law. The words of the statute of 2 and 3 Ed. 6, c. 13, which gave the penalty were, "under the pain of forfeiture of treble value of the tithes so taken or carried away," without stating in what manner, or by what form of action it should be recovered. After verdict for the plaintiff for twenty shillings, the defendant moved in arrest of judgment, that the plaintiff had not demanded enough; for by his own showing in his declaration, the value of the tithes not set out was £11 8d., and the treble value, therefore, was £33 2s., but the plaintiff had demanded only £33, without showing satisfaction of the two shillings. But it was not allowed, "for all the court held it was well enough," and said, "when the demand is of no sum certain, nor what he should recover in certainty, but only so much as shall

be given by the jury, although he varies from the first valuation, it is not material; for he shall not recover according to his demand in the declaration, but according to the verdict; wherefore it was adjudged for the plaintiff."

So also in the case of the *United States v. Colt*, 1 Peters, C. C. Rep. 153, Judge Washington says: — "Thus stands the doctrine in relation to the action of debt on contracts; and if debt will lie on a contract where the sum demanded is uncertain, it would seem to follow that it would lie for a penalty given by statute, which is uncertain and dependant upon the amount to be assessed by a jury, for when they have assessed it, the sum so fixed, becomes the amount of the penalty so given."

And, in speaking of the case of *Pemberton v. Shelton*, he says, "It cannot be said that this doctrine was laid down in consequence of the court considering this as a statutory action, to which it was necessary to accommodate the recovery, by changing general principles of law applicable to other cases, for it will appear, by reference to the statute, that it prescribes no remedy for enforcing the penalty; and that debt was brought, upon the common-law principle, that where a statute gives a penalty, debt may be brought to recover it."

Debt, therefore, may be brought for a penalty given by a statute, although it be uncertain; and an uncertain penalty, given by a statute, is a debt.

3. But it has been said that the by-law gives a discretion to the justice of the peace, and to him alone; and that where the inferior court has a discretion, error will not lie. This may be true in regard to writs of error at common law; but in appeals, which bring up the whole case, law and fact, as in proceedings under the civil law, where the cause is to be heard *de novo*, and the parties have a right in the appellate court, "*non allegata allegare, et non probata probare*," the case is otherwise. There the appellate court stands in the place of the inferior court, and has all the power which the inferior court had. Such is the case in the ecclesiastical courts, courts of chancery, and courts of admiralty. Appeals from justices of the peace, resemble appeals under the civil law, and have always been considered here, as bringing up the whole cause to be tried again *de novo*. The by-law, no doubt, intended that the court that tried the cause should exercise the discretion which it gave, and it could not deprive this court of its appellate jurisdiction, by giving a discretion to the inferior tribunal. It could neither give nor take away jurisdiction from the justice of the peace, or from this court, for both derive their power and jurisdiction from an authority paramount to that of the corporation.

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4. It has also been suggested that, by the Constitution of the United States, Congress, and Congress alone have the right to legislate for this District; that it is a power which cannot be delegated; and that the legislative power granted by Congress to the corporation of Washington, is a delegation of that power of exclusive legislation, which, by the Constitution, is vested in Congress alone. If this doctrine be correct, then is Congress, at once, deprived of one of its most important legislative powers; that of granting charters to corporations aggregate within the District; for it is, by common law, incident to every corporation aggregate to make by-laws for the government of its own members. '10 Co. 30, 31; Bac. Ab. Corporation, D. But those by-laws extend only to those members, and such as voluntarily place themselves within the jurisdiction of the corporation. They do not extend to any other part of the District. They make no part of the legislation over the District. It is not, therefore, a delegation of the power of exclusive legislation.

5. But, it is said, that if Congress had a right to grant this charter, and to give the corporation the legislative power it contains, yet that power is limited to the specific objects designated in the charter, and that the discharge of fire-arms in the city, is not one of those specific objects; and therefore the by-law is not warranted by the charter, and is void.

Among the powers specifically granted to the corporation, are the "power and authority to prevent and remove nuisances;" "to provide for the prevention and extinguishment of fires;" and "to pass all laws which shall be deemed necessary and proper for carrying into execution the powers vested, by this act, in the said corporation or its officers."

Nothing could be a greater nuisance to the inhabitants of the city, than the discharge of fire-arms, idly, and for sport or amusement in the streets, or near their dwelling-houses, if practised to an unlimited extent. To prevent that nuisance, the corporation had no other means than to prohibit such a discharge. The discharge of fire-arms near a stable, or other combustible matter, might set fire to it, and endanger the lives and property of the citizens, and its prohibition might be justified by the authority to prevent fires.

The means of carrying into execution the specific powers granted, are left to the discretion of the corporation.

This by-law, therefore, was warranted by the charter.

6. It has also been suggested that this ought to have been a *qui tam* action, because the by-law says, "one third whereof" (that, is, of the penalty,) "shall be for the use of the city; one third for the use of the constable, and the remaining third for the

use of the informer, or to the trustees of the poor, for the use and benefit of the poor of this corporation, in case the informer declines accepting the same.

It might be a sufficient answer to this objection, to say, that in a *qui tam* action, the plaintiff always sues for the king, or sovereign, and himself; and not for another subject or citizen and himself; nor for a body politic, other than the king, and himself. If a penalty be given to be divided among several persons, (subjects or citizens,) one cannot maintain an action for himself and the others, unless such right be expressly given by statute. If the informer should bring a *qui tam* action, in this case, he would have to declare that he sued as well for the corporation of Washington and for the constable, or for the trustees of the poor, as for himself, for no part of the penalty goes to the United States. No such *qui tam* action has yet been maintained; certainly not in this Court.

But Hawkins, (B. 2, c. 26, § 17,) says that an information, or action *qui tam*, will not lie "unless the whole or part of the penalty be expressly given to him who will sue for it; for otherwise it goes to the king, and nothing can be demanded by the party. But where the statute gives any part of the penalty to him who will sue for it by action or information, &c. I take it to be settled at this day, that any one may bring such action or information and lay his demand *tam pro domino rege quam pro seipso*."

This by-law does not give any part of this penalty to any person who will sue for it. It only declares to whose use it shall be applied after it has been recovered in the usual manner; and provides that if the informer "declines accepting" his third, it shall go to the trustees of the poor. The expression "declines accepting" implies an offer, which implies a previous recovery. If the informer were the person to sue for it, the language would have been, "declines suing," and not "declines accepting." A *qui tam* action, therefore, was not the proper remedy.

7. It has been contended also that this appeal should be dismissed because it has not been ordered under the corporate seal, but only under the direction of the mayor.

The doctrine, that a corporation can do nothing but under its corporate seal, has long been exploded.

There are many acts which it may do by its agents under the authority of its by-laws.

This appeal was taken by the attorney at law of the corporation, who was duly appointed by the mayor, under the by-law of June 30th, 1824, creating the office; and which by-law was authorized by the seventh section of the charter which gives the cor-

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poration power to provide for the appointment of such officers as may be necessary to execute the laws of the corporation. And by the third section of the charter which authorizes and requires the mayor to nominate, and, with the consent of the board of aldermen, to appoint to all offices under the corporation, except commissioners of election. By the by-law of the 30th of June, 1824, it is made the duty of the attorney "to defend the interests of the corporation in all suits instituted by or against the corporation." He had a right, and it was part of his duty to take this appeal, if he believed that the interests of the corporation required it.

The appeal is therefore correctly taken, without any special order under the corporate seal.

8. It is also objected that Mr. Waters who issued the warrant and tried the cause below, had no jurisdiction because it does not appear upon the proceedings that he was one of the justices of the peace selected in the manner designated by the sixth section of the by-law of the 8th of November, 1830, to issue warrants for offences against the by-laws of the corporation. That by-law, however, is only directory to the officers concerned in the prosecution of offences against those by-laws, and cannot deprive a justice of the peace of a jurisdiction given to him by a paramount authority. But however that may be, it is not a good ground for dismissing the appeal, that the selection does not appear upon the proceedings before the justice. It is a fact which may be proved here if necessary.

9. It is also objected that it does not appear on the proceedings that the by-law had been published five days in some newspaper of the city, by authority of the corporation, according to the fifth section of the by-law of the 8th of November, 1830.

But it is not necessary that the fact should appear upon the proceedings of the justice.

As the cause is before this court upon an appeal which brings up the whole cause, to be tried *de novo*, that fact may now be proved here if capable of proof; or possibly, after a lapse of twenty years, and the publication of it in books and pamphlets, the publication of it in a newspaper may be presumed; and perhaps the by-law of November 8th, 1830, was intended to apply only to by-laws subsequently enacted. At all events it is no ground for dismissing the appeal, that that fact does not appear upon the proceedings.

Upon none of the grounds stated, therefore, can this Court dismiss the appeal.

After the above opinion was delivered *Mr. Eaton* observed that the Court had omitted to notice one objection upon which he

relied, namely, that he had not had ten days' notice of the judgment in his favor before the sitting of this Court; and he contended that he was entitled to such notice, by the seventh section of the Act of the 1st of March, 1823, extending the jurisdiction of justices of the peace.

The COURT answered, that the reason why the Court had not noticed it was that they did not exactly understand the purport of his objection. Mr. Eaton then explained his objection, as above.

But the COURT said that the provision in the clause of the seventh section of the act referred to, was evidently made for the benefit of the appellant, not of the appellee; and was merely to prevent the original defendant's appeal from being dismissed because not brought up to the term next after the rendition of the judgment, if he had not notice of such judgment ten days at least before that term. That section does not require that the party in whose favor a judgment is rendered by the justice, should have ten days' notice of such judgment in any case.

THRUSTON, J., dissenting, delivered the following opinion:

On an appeal from the judgment of the magistrate, in favor of the defendant.

The case was as follows: John H. Eaton was charged, before Waters, a magistrate of the county of Washington, with firing a gun, or pistol, or other fire-arm within certain limits in the city of Washington, against the provisions of an ordinance of the corporation which subjects the offender to a fine, not less than five nor more than ten dollars, at the discretion of the magistrate. The magistrate gave judgment, after hearing the case, in favor of the defendant, Eaton; and upon this judgment the corporation have appealed to this Court.

The defendant, in support of the judgment of the magistrate, has submitted to the Court the following considerations.

1. That the appeal ought to be dismissed, because the magistrate was not one of those selected by the corporation for the trial of cases in which they were parties.

2. Because the appeal was not ordered by the corporate body in their corporate character, but by the mayor, J. P. Van Ness.

3. Because this Court has no appellate jurisdiction in the case of fines and pecuniary mullets.

4. If this Court has jurisdiction generally where the fine is certain and fixed, they have none where the *quantum* of fine is uncertain, but dependent on the *arbitrium* of the magistrate between a *minimum* and a *maximum* limit.

As to the first point, "that the magistrate was not one of those selected by the corporate authorities according to the provisions of the ordinance for the hearing of cases of this sort."

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This objection is not valid ; because every justice of the peace has equal power and jurisdiction, and the corporation have no right to disfranchise any justice of the peace, or to invest any of them with exclusive privileges which may not be enjoyed by any other magistrate. That the corporation may, for their convenience, and because of the greater trust and confidence they may repose in some justices over others, require of their police officers to have the corporation cases brought before certain justices of their selection, may be proper ; but this is a matter which only relates to the corporation and those officers. If the officers disobey this injunction, it is competent for the corporation, perhaps, to dismiss them as corporate officers ; but the jurisdiction of justices of the peace is derived, not from the corporation, but from the laws of the United States ; and any justice of the peace is as competent to entertain jurisdiction of pecuniary mulcts, within certain limits, as any other justices ; and it is not error, if any other than those selected by the corporation take cognizance of the offence.

Secondly. "The appeal was not ordered by the corporate authorities, but by the mayor."

There is nothing in this objection. The appeal is not in the name or in behalf of the mayor, but of the corporation in their corporate style and character.

It is true, the mayor directed the appeal in behalf of the corporation ; and this he might do as their agent, and ministerial officer, and they, by their attorney in Court, have ratified and avowed his act. Surely it would be requiring too much, that by a solemn resolution of the board they should have authorized this appeal, and further solemnized it by affixing thereto their corporate seal. We have never questioned the authority of any attorney of this Court, nor required proof of his substitution, or representative power, when his name is marked on the docket, and no one appears to question his right to represent the party for whom he professes to act. I have never known an instance in which this Court have ever required an attorney, admitted to practise therein, to produce his warrant to represent any party to a suit therein. The confidence reposed in the bar, and the comity due to them in the relations in which they stand towards the bench, forbid this scrutiny. It would be tolerated only where the party, whom the attorney professes to represent, should disavow the doings of the attorney.

As to the third objection, "This Court has no appellate jurisdiction in the case of fines and pecuniary mulcts."

Here, indeed, is a matter of grave consideration. I know of no appellate power in this Court from the judgment of a justice of the peace, but what is given by the statute. "The Act of March 1, 1823, [3 Stat. at Large, 743,] for extending the jurisdiction of single

magistrates," which empowers such magistrate to take cognizance of cases as far as \$50, describes precisely the cases in which such justice may exercise jurisdiction. The cases there enumerated, most clearly, in my opinion, are those of a civil character only, because it speaks of the debtor, "his executors and administrators;" because it authorizes the justice to give interest on the judgment, &c.; because it exempts females, and males over seventy from arrest, imprisonment, and execution.

In the seventh section of the act, an appeal from the judgment of the magistrate is given to this Court in all cases where the judgment is for a sum over five dollars.

Now, as it is inconsistent with the character of a pecuniary fine that executors and administrators should be liable for it, or interest charged on the judgment for it; and against reason that females, or men over seventy should be exempted from the penalties for violating a penal law, I take it for granted that this first section, prescribing the jurisdiction of justices of the peace, was intended, and is by necessary construction, limited to cases of a civil character only. Then, when the right of appeal was given by the said seventh section to this Court from the judgment of a magistrate, is not that appeal only from judgments rendered under the powers given to the magistrate by the preceding section; and is it not clear that those powers were limited to cases of a civil character only? Cases where executors and administrators might be charged; where interest might be computed and taxed; where sex and age were exempted from arrests and imprisonments on the judgments, which is utterly inconsistent with any of the characteristics of a criminal law; for who ever heard of exemptions in favor of age or sex from the animadversions of a criminal statute? yet, notwithstanding this clear restriction of our appellate jurisdiction to cases of a civil character, yet, we have undertaken to exercise it in criminal cases, and thus, by nice and rigid application of the rules of pleading, to defeat and prostrate the guards and securities of society derived from the denunciations of the law by inspecting the warrants and doings of justices of the peace, trying them by the touchstone of technical criticism, and reversing their decisions on grounds, at least, doubtful, and which must inevitably lead to the annihilation of the whole city police; and how have we usurped this fatal power thus to loosen the bands which bind society together, to give this triumphant victory to the wicked, to trample with impunity on all the rights, the peace, and comfort of the more orderly and better disposed portion of society. By a forced and gross perversion of terms, by considering a penalty a pecuniary mulct for a certain offence, as a debt. How can this be? What gives a magistrate jurisdiction when he issues

a warrant against an offender for the violation of a penal statute? Surely, at the time the warrant issues there is no debt subsisting; the debt is not the foundation of the warrant, but the consequence of conviction; *non constat*, at that time, that the party will be convicted. What does the accused come to defend? a debt? no; against the commission of an act forbidden by law. There is not a word about debt in the whole proceeding, except for form's sake, in the warrant. The whole question is, did you, or did you not, commit the offence? If the justice decides affirmatively, then indeed the penalty follows—a pecuniary mulct. On an appeal, then, what does this Court examine? whether the accused owes the money or not? No; whether he has committed the offence or not. Where do we get the power to try a question of this sort? Is it because in the warrant the justice has, in conformity with some general directory provision in the charter of the corporation, charged the offence as a debt? Suppose the form of the warrant changed, and it were to charge the defendant specifically with the real truth, that he had violated the law by shooting, &c., against the form of the ordinance in such case made and provided, as in offences indictable in this Court where the special offence is set out; then, not being a debt, there would be no appeal. Now, by the statute of Maryland, justices are invested with jurisdiction over misdemeanors where the penalty does not exceed £5 by way of action of debt; but their jurisdiction was final, and there was no appeal from their judgments.

But we claim a right of entertaining an appeal from the judgments of magistrates in cases of violations of penal ordinances of the corporation entirely, as I understand from the expressions in the charter of the corporation, “authorizing penalties to be recovered, and executions to issue for them as in cases of small debts.” Does this give an appellate jurisdiction to this Court?

The form of proceeding for the recovery of these penalties does not necessarily invest them with all the character and properties of debts purely civil; for I have endeavored to show the absurdity resulting from such a construction, and that the appellate jurisdiction given us by the statute can be commensurate only with the original jurisdiction given by the same statute to the justices, and that it would be most absurd and unreasonable that penalties for municipal offences should be embraced in the statute, from the incongruity subsisting between pecuniary mulcts and debts of a purely civil nature. By the Maryland law, no appeal was allowable from the judgment of a magistrate in the case of fines and penalties, for by the Act of 1791, c. 68, for the speedy recovery of small debts out of court, &c. &c., the jurisdiction of the justices as well as that of the county courts by appeal from

their judgments, was confined to cases strictly civil in their nature ; "to debts or sums of money due on contract, or damages for the non-delivery of grain or other articles," excluding debts, (if they may be so called,) incurred by transgressing penal laws. If there be any statute of Maryland allowing appeals in cases of misdemeanors, I am not aware of it. And so in our statute, to debts where interest might be taxed, executors and administrators made liable, and age and sex were exempted from imprisonment ; in such cases only does the statute authorize an appeal ; and pecuniary mulcts cannot, without violating every principle which characterizes them, be brought within the scope of the statute ; therefore their recovery is provided for by the aforesaid clause of the charter, making them "recoverable as other small debts," &c., so that it appears that the State was satisfied to leave the exclusive jurisdiction over small offences, to the small extent of five dollars' penalty, to the magistrate. In this existing state of things, the Congress pass the aforesaid act, "for extending," &c. Surely if they meant to invest this Court with power to revise the proceedings of justices under corporation ordinances imposing penalties, they would have used terms more congenial with the matter. A long established law is not to be annulled by far-fetched implications, or a subsequent statute, when any sensible interpretation of the statute utterly repudiates such implications. Surely they never meant that if a man, sentenced to pay a penalty, should die before it was levied, that his executors or administrators should be charged with it ; surely not, that the judgment for the penalty should carry interest ; and certainly not, to exempt pauper vagrants and abandoned profligates of any age or sex from the only coercive power over them, that of imprisonment and arrest, when they incurred the penalty, and possessed no means of paying it. See the consequences : a woman, or a man over seventy, may riot in the violation of every penal ordinance, may set at defiance the whole police of the city, if there be no breach of the peace. This is really more deference than was ever paid to age or sex in any country. This Court, at least, has not been quite so indulgent to the ladies, as some recent convictions, and not very lenient sentences, prove. But we claim appellate jurisdiction of such cases from the expressions, "in all cases where," &c., in the section authorizing appeals from the judgments of single magistrates ; now, that word, *all*, can, I think, only apply to the enumerated cases in the first section ; the appellate jurisdiction can be commensurate only with the given original jurisdiction, and that, I have endeavored to show, embraces civil cases only. But the word *debt* is used in the warrant. It is called a plea of debt ; and hence our claim to enter-

tain an appeal in the case. But this form was given by the Maryland statute, and has probably been continued without much reason ever since ; and because of this anomalous form of proceeding, by calling it an action of debt, does it necessarily involve all the incidents of debt ? Certainly a debt created by statute is available against executors and administrators ; a penalty is not. It carries interest *per se* ; a penalty does not. In short, there is no rational construction of the statute "for extending," &c., either from the words, or meaning, or purport of the clause giving and defining the cases in which a justice may exercise original jurisdiction, as well as those granting appeals to this Court from their decisions, that can justify this Court in entertaining appeals from the judgments of justices, under penal statutes and ordinances ; and this is greatly strengthened by the strange consequences that must result from such an exercise of jurisdiction. As far as I can discern, there is no such appeal allowable ; it was so in Maryland ; and as there are no express words, nor rational construction of the statute which has changed the law, I am compelled to say that the jurisdiction of the magistrates in cases of penal statutes and ordinances is exclusive and beyond our control, as much as our jurisdiction is final and beyond the control of the Supreme Court in criminal cases. Whether it be a wise provision of the law I know not. If it be thought not so, the Congress is competent, and they only, to change it. I am of opinion, however, that if we determine to exercise appellate jurisdiction in such cases, and do not relax somewhat of that severity and legal scrutiny in regard to the doings of justices, we shall have no criminal law worth having. It has been ruled, and not yet overruled by the Court, that a criminal of any the most aggravated offence, who has been bailed, and forfeited his recognizance, is clear of the crime. That criminals sentenced to imprisonment and fine for misdemeanors, can be entitled to the bounds ; and for a fine only can be released under the insolvent laws. Having hitherto exercised this now disputed appellate jurisdiction, the warrants of magistrates have been examined with the most rigid legal criticism because the magistrates had not framed their warrants with all the exactness of indictments, and their judgments have been reversed, and that wholesome police, so essential to the well-being of our citizens, paralyzed ; mittimus are looked into with the eyes of special pleaders ; and, in a recent case, a man was discharged because, having incurred a penalty and being unable to pay it, and having, for such inability been committed to the workhouse, the mittimus neglected to state that he was a man of color, although, when brought before the Court, he was evidently so ; and although the offence could only be committed

by a man of color, and it was sufficiently set out, in the mittimus, in every respect, except the words "man of color." We believed the mittimus, then, that he, by possibility, might not be a man of color, against the evidence of our own eyes. But here it was urged, and in all cases where we had heard appeals in such cases, the old maxim, "It is a penal statute, and must be construed strictly," but where the question is jurisdiction or no jurisdiction, it is quite a civil affair; "nothing but an action of debt," and being so we have jurisdiction by the statute. If it be a civil matter, how came we to apply the strict rules of criminal pleading to cases of a civil character only? This seems to be blowing hot and cold with the same breath; to get jurisdiction, the case is merely one of debt, a civil matter altogether; when we get it before us we pounce upon it with all the stern severity and criticism of criminal pleadings, utterly disregarding the directions of the statute that we are to decide according to law, justice, and equity, which I take to be clearly indicative of an intention in the legislature to authorize the Court to relax the strict rules of construction in regard to warrants for pecuniary mulcts, if they be really purely civil in their character, if there be enough, though not set out in technical form, in the warrant, to inform the defendant of the offence with which he is charged, or otherwise we disregard entirely the emphatic and important words, justice and equity, and the more especially as it may be supposed to have been in the contemplation of the legislature, that the warrants from which appeals are taken to this Court are devised by justices of the peace who are not lawyers by profession, nor skilled in the subtleties of special pleading. I have done with this objection; and if there be a doubt in the mind of any on this point, I think there can be but little as to the validity of the last objection, namely, "That if this Court has jurisdiction generally where the fine is certain and fixed, they have none when the *quantum* of fine is uncertain, and depends on the discretion of the magistrate between a *minimum* and a *maximum* limit."

I need say nothing of the argument, that it is a settled principle, that, from the judgment of a court in the exercise of a discretionary power, there is no appeal, which I thought had great force in it; nor of the argument of the counsel for the corporation, that, inasmuch as the magistrate dismissed the warrant, and exercised, consequently, no *arbitrium*, that, as the case would be taken up, *de novo*, in this Court, this Court was competent, if they reversed the justice's decision, to assess the fine. It is true, if we were to take up the case, and hear the evidence, we might be of opinion that the justice did wrong, and that he ought to have given judgment for the corporation; but, when we had

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done so, and come to the point of assessing the fine, we should be at fault. Notwithstanding the Proteus character assumed for prosecutions for pecuniary penalties, I consider them as belonging to the criminal side of the Court, as real penal statutes, whether animadverting on *mala in se*, or *mala prohibita*, and the defendant entitled to all the privileges given by the statute; and one is, that the fine shall be assessed by the justice, at his discretion, and not by this Court, at theirs. Suppose, now, after reversing the magistrate's decision, we come to the consideration of assessing it, where shall we fix it; at the *minimum*, the *maximum*, or between the two? Neither of the two latter, because the law has given this power to another and not to us; does it follow, because the law has given it to one, it can be exercised by three others? The defendant has a right to have his exclusive judge, as to that point; well, it may be said, we may safely fix it at the *minimum* term; the defendant could have nothing to complain of there; but the law would, for it contemplated something more—a higher assessment—a greater fine; we must take the whole power of the justice, or none; we cannot execute half a law, because we cannot get at the other half; all the range between five and ten dollars is barred against us.

For these reasons, I am for affirming the judgment.

RICHARD F. BLYDENBURGH, Administrator of Jesse Smith, v.
GEORGE LOWRY.

Money received by the defendant, for the estate of the intestate, in the lifetime of the first administrator, may be recovered as assets in an action by a subsequent administrator.

Letters of administration granted by the surrogate of Suffolk county, in New York, upon *bona notabilia* found there, will enable the administrator to recover assets in the District of Columbia, under the Act of Congress of June 24, 1812, § 11.

THIS was an action of *assumpsit* brought by the plaintiff, as administrator of Jesse Smith, to recover \$1,000 received by the defendant to the use of the estate of Jesse Smith, in the lifetime of a previous administrator who obtained his letters of administration in Philadelphia, where the intestate died. The declaration contained only the common money counts, and the Maryland count upon *indebitatus assumpsit* for sundry matters properly chargeable in account, and all the promises were alleged to have been made to the plaintiff, "as administrator of Jesse Smith."

At the trial of the issue of *non assumpsit*, the plaintiff offered to prove, by competent witnesses, that a certain John C. Mitchell, being indebted to Jesse Smith, the plaintiff's intestate, in the sum

of \$1,287, executed a mortgage of a lot in Georgetown, to the said intestate, to secure the same debt; that, upon the death of the said Smith, in Philadelphia, letters of administration were duly granted to a certain F. S. Bailey, who continued to act as administrator until his death; that, previous to the death of the said Bailey, the said lot, so mortgaged, was sold to a certain P. O'Donnoghue, for the use and benefit of the intestate Jesse Smith's estate; that the purchase-money for the same was paid by the said O'Donnoghue to the said defendant, George Lowry, in the lifetime of the said Bailey; but that, before the same was paid over by the defendant to the said Bailey, the said Bailey died. The plaintiff also produced, and offered to read, in evidence, his letters of administration, granted on the 3d of January, 1832, by the surrogate of the county of Suffolk, in the State of New York, reciting that the deceased was, at the time of his death, an inhabitant of the city of Philadelphia, "and that assets now remain in the said county of Suffolk, and State of New York."

To the admission of all which evidence, *Mr. Redin*, for the defendant, objected, and contended that the surrogate in New York had no authority to grant letters of administration upon the estate of a person who died in Philadelphia. The Act of Congress of June 24, 1812, § 11, [2 Stat. at Large, 755,] requires that the foreign letters of administration should be granted by "the proper authority." Letters granted in New York would be of no authority in Pennsylvania. They could only cover the assets in New York. They could give no authority over the assets here. There might be as many administrators as there are States in the Union. The Act of Congress means administration granted in the State wherein the intestate died. The plaintiff should have letters in Pennsylvania, or here.

The COURT (THRUSTON, J., absent,) stopped *Mr. Dunlop*, who was about to reply, and decided that the letters were sufficient, having been granted by the surrogate of Suffolk county, in New York, in the usual form, upon a suggestion of assets in that county, and certified according to the Act of Congress of June 24, 1812, § 11, [2 Stat. at Large, 755,] and that the other evidence offered by the plaintiff was admissible.

Mr. Redin then prayed the Court to instruct the jury, that, upon that evidence, the plaintiff was not entitled to recover.

Mr. Wallach, contra. The plaintiff may recover upon a promise to his predecessor. *Catherwood v. Chabaud*, 1 B. & C. 150; *Hurst v. Smith*, 7 T. R. 182; *Sullivan v. Holker*, 15 Mass. 374; *Tingrey v. Brown*, 1 B. & P. 310.

Mr. Redin. The question is, whether the plaintiff can recover

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this money, in this action, or whether the suit should not have been brought in the name of the administrator of Bailey, the first administrator. The money was received by the agent of the first administrator, and remained in his hands. It did not remain as outstanding assets of the estate of Jesse Smith. It was not assets for which the plaintiff could be charged, unless he had received it; but the first administrator was chargeable; and if Lowry had spent the money, and become insolvent, the first administrator must have lost it. An administrator *de bonis non* can collect only the assets outstanding. *Calder v. Pyfer*, in this Court, in October, 1823, (2 Cranch, C. C. 430.) Calder was administrator *de bonis non*; the defendant had bought goods at the sale made by the first administrator, and was indebted therefor to the first administrator. The court decided, in that case, that the plaintiff, the administrator *de bonis non*, could not recover in his own name. *Hurst v. Smith*, 7 T. R. 182; the case of *Magruder's Administratrix*, in this Court, in December, 1825, (2 Cranch, C. C. 626.)

The administratrix sold the goods, and took notes payable to herself. She brought suit and died before judgment. Her administratrix entered her appearance, and obtained judgment. The administrator *de bonis non* prayed, that the judgment might be entered for his use; but the Court refused. *Barker v. Topper*, 1 Vern. 473. If the first administrator has converted the assets into money, the administrator *de bonis non* has no authority. There is no privity between him and the first administrator. Maryland testamentary law of 1798, ch. 101, c. 5, § 6, and ch. 14, § 2.

In *Sibley v. Williams*, 3 Gill & J. 52, the Court of Appeals in Maryland said, that the Act of 1798 did not mean to make any thing assets in the hands of the administrator *de bonis non*, but what remained in specie. The Act of Maryland of 1820, extends only to bonds, notes, &c., taken by the first administrator. The defendant could only be discharged by a receipt from the administrator of the first administrator, for whom he received the money.

The plaintiff cannot recover upon this declaration. It is upon an implied promise to the plaintiff himself as administrator. In the cases cited, the promise was made to the first administrator, and so laid in the declaration.

Mr. J. Dunlop, for the plaintiff. If the administrator *de bonis non* stands in the place of the first administrator; if the promise to the first administrator be to him as administrator, and if the money promised, when received by the first administrator, would be assets, and the money be not paid, according to the promise,

in the lifetime of the first administrator, it is assets unrecovered. There is a privity between the first administrator and the administrator *de bonis non*. If it be property of Jesse Smith, unadministered, the administrator *de bonis non* may recover it. If Bailey had a right to recover this money in his name as administrator, the administrator *de bonis non* may recover it as administrator. Saund. on Pleading, 606. The only question is, whether this money is the property of the estate of Jesse Smith; that is, whether it be assets, or the personal property of Bailey.

This debt has never been converted into money. The debt was due by Mitchell to Smith. Bailey never received the money; for although he gave the defendant authority to receive it, and he did receive it, yet he afterwards refused to pay it to Bailey.

MORSELL, J. If the defendant had become insolvent, whose loss would it have been? It might have been the loss of the administrator, but it is not, therefore, less assets. If the property be changed, it is still assets, as in the case cited from *Barnwell v. Cresswell*, where the first administrator took a bill of exchange for a debt due to the estate, and died before suit brought upon it. The administrator *de bonis non* sued on it, and recovered.

The COURT (MORSELL, J., *contrà*,) decided that the plaintiff had a right to bring and maintain this action.

Verdict for the plaintiff.

A bill of exceptions was taken, but no writ of error was prosecuted.

WATERS'S AND SCOTT'S LESSEE v. WILLIAM BUTLER.

A purchaser, under a deed of trust, need not give notice to quit, before bringing ejectment against the grantor of the trust-deed.

Notice to quit is not necessary, where the relation of landlord and tenant does not exist.

If, by the terms of the deed of trust, the grantor is to retain the possession until a sale should be made under the deed, his tenancy ceases upon the sale, and no notice to quit is necessary.

EJECTMENT for a city lot sold to the plaintiff's lessor by the trustee under a deed of trust from the defendant to secure a debt due by him to the plaintiff's lessor.

Mr. Marbury, for the defendant. The verbal notice to quit, given by *Mr. Fendall*, was less than three months.

A mortgagor in possession is entitled to notice; but here, also, was a covenant that the grantor should retain possession until a sale should become necessary according to the terms of the deed of trust.

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This is not under a decree of foreclosure, which severs the priority of contract between mortgagor and mortgagee.

Mr. Wallach, contra. There the relation of landlord and tenant does not exist; and where the defendant claims to hold in fee, notice is not necessary. But the notice is sufficient. The time is not material. Notice is not necessary where the relation of landlord and tenant does not exist. 1 Wheat. Selw. 585; *Jackson v. Chase*, 2 Johns. 84; *Jackson v. Fuller*, 4 Ib. 215; *Jackson v. Whitbeck*, 3 Ib. 422; 13 Ib. 106; 2 Ib. 353.

The COURT (MORSELL, J., doubting,) refused to instruct the jury, that three months notice to quit was necessary; being of opinion that no notice was necessary, because the relation of landlord and tenant did not exist; and that if it did, the tenancy was only until a sale should become necessary; and ended when the sale was made. The end of the tenancy was certain, because it could be rendered certain.

Verdict for the plaintiff.

UNITED STATES v. PRISCY NAILOR.

Upon an indictment for keeping a house of ill fame, evidence of the ill fame of the defendant herself, cannot be given.

INDICTMENT for keeping a house of ill fame, &c.

The COURT, (THRUSTON, J., absent,) on the authority of the case of the *United States v. Jourdine*, (*ante*, p. 338,) refused to permit the United States to give evidence of the ill fame of the defendant herself.

Verdict, not guilty.

UNITED STATES v. CHRISTIANA WILLIAMS.

The Circuit Court of the District of Columbia has power to hold special sessions for the trial of criminal causes; and has jurisdiction, at a special session, to try offences committed between the time of ordering and the time of holding such session; and its jurisdiction is not limited to such causes of federal jurisdiction as may be tried in a circuit court of the United States sitting in a State.

The Circuit Court of the District of Columbia, has all the powers which, by law, were vested in the circuit courts of the United States on the 27th of February, 1801, and, among others, the power to send attachments into any other district, for witnesses in criminal cases.

INDICTMENT, for keeping a house of ill fame, found at the special session in September last, and continued over, by law, to this term.

Mr. Dandridge, for the defendant, moved the Court to quash the indictment, because this Court, at this term, has not jurisdiction of the cause, there being no power to continue causes from the special session to this term.

The Judiciary Act of 1789, § 5, [1 Stat. at Large, 73,] gives the power to the circuit courts of the United States in these words: "And the circuit courts shall have power to hold special sessions for the trial of criminal causes at any other time, at their discretion, or at the discretion of the Supreme Court."

It does not provide for a continuance of causes from a special to a stated session of the court. That power is given by the Act of March 2d, 1793, [1 Stat. at Large, 333,] but it is only given to special sessions appointed in the manner directed by that act, by a justice of the Supreme Court and a district judge.

This Court is not a circuit court of the United States. It is the Circuit Court of the District of Columbia. It can only exercise the powers of a circuit court of the United States in cases within the jurisdiction of a circuit court of the United States.

This Court had no authority to call a special court, because there were no causes to try when the special session was ordered. The power given to the circuit courts of the United States is to hold special sessions for the trial of criminal causes, not to institute new prosecutions; for the trial only of causes existing at the time of ordering the special session, and for the trial of which the special session is ordered. See *Hamilton's case*, 3 Dall. 17, and the *Insurgent's case*, Id. 513.

THRUSTON, J., said his opinion was that a special court could only be holden for the trial of causes existing at the time of calling the special court; not of causes arising between the order for calling the special court and the actual session of the court.

Mr. Dandridge. It was for the benefit of the prisoners.

THRUSTON, J. And that they might have a speedy trial.

Mr. Dandridge. There is no case where a special court has been called when there were no causes to try.

The Act of 1793, repeals the provision in the Act of 1789, for holding special sessions of the circuit courts. See Mr. Justice Story's opinion in *Cornell's case*, 2 Mason, 91.

If this Court has power to hold special sessions, it is only in federal cases.

THRUSTON, J., said he looked upon the power as only given for existing causes. He approved Judge Brockenbrough's opinion as to his distinction between federal and municipal jurisdiction; and was of opinion that this Court has power to hold special sessions for federal offences only; and that only for causes existing at the

time of calling the court, and in which indictments had not been found at a stated term.

Mr. J. Dunlop, contra. If Judge Brockenbrough's opinion is law, and is to be carried out in all its consequences, we must be in a deplorable condition; the right of appeal must be confined to federal cases.

THRUSTON, J. One consideration bears out Judge Brockenbrough. The leading motive of exclusive jurisdiction was the security of Congress from insult; and Congress cannot extend jurisdiction beyond the district.

Mr. Dunlop. So also the 30th section of the Act of 1789, authorizing the taking of testimony, would be confined to cases of federal jurisdiction.

Mr. Dandridge, admitted that in *Cohen's case*, the Supreme Court of the United States decided that Congress, in legislating for the District of Columbia, legislated in its national character.

Mr. Dunlop. This Court is not a double-faced court. It is altogether federal; created for federal purposes; for the benefit of the national government, and of the people of the whole United States; for the protection of all. Congress had a constitutional right to prescribe the jurisdiction of this Court, and to give it all the powers necessary for the exercise of that jurisdiction. They have done so. The same act (27th February, 1801,) gives the jurisdiction and the powers. The jurisdiction is given by the 5th section, and the powers by the 3d.

THRUSTON, J. Have the circuit courts of the United States a right to try assault and battery? If they have no such power, then we have no such power.

Mr. Dunlop. If they had jurisdiction to try assault and battery, they would have power to exercise that jurisdiction. This Court has the jurisdiction, and therefore has the power to exercise it.

But it is said, that the special court had no jurisdiction of causes not existing at the time of calling the session.

The power to hold a special session in some cases, is admitted. Then, is there any thing in the laws of the United States to limit it to causes existing at the time of ordering it?

It is also said that the Act of 1793, continuing the causes to the next stated session, does not apply to a special session holden under the Act of 1789.

THRUSTON, J. The special court, mentioned in the Act of 1793, must be called by a judge of the Supreme Court of the United States.

Mr. Dunlop. The Act of 1793, regards the place of holding the special session; but the words authorizing the continuance of causes, are general, and apply to all special sessions. If the words

are broad enough, its provisions must be applied to all cases within the reason.

THRUSTON, J. The words are, "for the trial of criminal causes;" meaning causes then existing. There must be a cause existing. The probability that causes may arise, will not justify the call of a special court.

Mr. Dunlop. Causes arising after the order for calling, and before the session of the special court, are within the reason and the words of the law.

Mr. Brice, in reply. This Court has no right to hold a special session, under any circumstances. The Act of 1789, relates only to the circuit courts created by that act. Congress only gave to this Court the general powers of the circuit courts of the United States; not the special powers given to particular courts; and those general powers can only be used in cases of general federal jurisdiction. No special session can be called but by a judge of the Supreme Court of the United States.

The Act of 1793, either repeals the Act of 1789, on this subject, or it appoints and limits the mode in which the power, given by the Act of 1789, shall be exercised; so that no special session can be called but according to the mode prescribed by the Act of 1793.

This is not a circuit court of the United States.

The Act of 1793, is not applicable to this district, because there is no place nearer to the place where the offence was committed than the regular place of session. The clause of the Act of 1793, respecting the return of process, is conclusive that the only causes to be tried at the special session, are causes existing at the time of calling it.

CRANCH, C. J., delivered the opinion of the Court, as follows: (THRUSTON, J., *contrà*.)

This is an indictment, for keeping a house of ill-fame, &c., found at the special session of this Court, holden in September last, for the trial of criminal causes, under an order of this Court made at the stated March term.

A motion is now made by the defendant's counsel to quash the indictment, upon the ground,

1st. That no proceeding, or cause which was pending at the special session in September, was, or could be by law continued or removed to this stated term of the Court.

2d. That the Court had no power to hold a special session for the trial of criminal causes; but if it had, the power was confined to the trial of criminal causes of a purely federal character, such as would be cognizable by a circuit court of the United States, sitting in a State; and such as had arisen and were existing at

the time of the order for holding the session. That the special session had no jurisdiction of an offence against what is supposed to be the municipal law of this district; such as the offence is, which is charged in this indictment.

1. The first question is, whether the business depending for trial at the special session in September was, at the close thereof, removed to this stated term of the court.

The answer to this question may be given in the words of the 3d section of the Act of Congress of the 2d of March, 1793, [1 Stat. at Large, 333,] "That all business depending for trial at any special court, shall, at the close thereof, be considered as of course removed to the next stated term of the Circuit Court."

But in order to show that this cause was so removed, it must appear that the special session had jurisdiction of the cause; that it was depending for trial at that session, and that the session was lawfully holden.

This brings us to the second question, namely:

2. Whether the Court had authority to hold such a special session for the trial of criminal causes; and whether it had jurisdiction of this cause, the prosecution of which was in no manner commenced until after the special session was opened, nor until the grand jury had, at that session, found a presentment upon their own motion.

By the 3d section of the Act of the 27th of February, 1801, [2 Stat. at Large, 103,] by which this Court was established, it is enacted, "That the said court, and the judges thereof shall have all the powers by law vested in the circuit courts and the judges of the circuit courts of the United States."

This section does not confer any jurisdiction upon this Court; it gives only the powers necessary for the exercise of its jurisdiction. That jurisdiction is given by the 5th section; and in giving it, no distinction is made between cases of a purely federal character, and those of what might be called a municipal character; nor is such a distinction even suggested.

The jurisdiction is given in very simple and comprehensive terms, namely: "That the said court shall have cognizance of all crimes and offences committed within said district; and of all cases in law and equity between parties both or either of which shall be resident, or shall be found, within said district; and also of all actions or suits of a civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants; and of all seizures on land or water, and all penalties and forfeitures made, arising, or accruing under the laws of the United States."

Its criminal jurisdiction is of "all crimes and offences committed within the district," whether against an act of Congress applicable to the whole United States, or against an act confined in its operation to the District of Columbia. They are equally offences against the sovereign power of the United States, and are equally of federal jurisdiction.

When this Court was created it was formed upon the model of the other circuit courts of the United States, established by a previous act of the same session, passed on the 13th of February, 1801, [2 Stat. at Large, 89,] by which the United States were divided into six circuits, and a circuit court, consisting of three judges, provided for each circuit.

The circuit court of this district was to have all the powers which by that act were given to the other circuit courts. We are, therefore, referred to the Act of the 13th of February, 1801, [2 Stat. at Large, 89,] for our powers; but not for our jurisdiction. That Act expressly conferred upon the circuit courts which it established, all the powers theretofore granted to the circuit courts of the United States, in addition to certain other powers expressly given by the same act.

It had been enacted by the Judiciary Act of 1789, § 5, [1 Stat. at Large, 73,] after fixing certain days for holding a circuit court in each district, "that the circuit courts shall have power to hold special sessions for the trial of criminal causes, at any other time, at their discretion," and this clause is reenacted in the act of the 13th of February, 1801, [2 Stat. at Large, 89,] nearly in the same words.

On the 27th of February, 1801, it is clear, therefore, that the circuit courts of the United States, had, by law, power to hold special sessions for the trial of criminal causes at their discretion; and on that day it was enacted that this Court should have all the powers by law vested in the circuit courts of the United States. This Court, therefore, had the power to hold special sessions for the trial of criminal causes at its discretion.

The special session of September was ordered by this Court on the 18th day of May, 1833, being the last day of the stated March term.

There were at that time persons either in jail or bound by recognizance, upon whose cases the grand jury, which had been discharged, had not acted. It was presumed by the court, from the experience of former years, that in the long vacation of more than seven months which would intervene before the next stated term in November, many persons would be committed to gaol upon criminal charges, some of whom might be innocent, and all of whom the law would presume to be so until found guilty upon trial.

With the view, therefore, of diminishing the term of their imprisonment, and of preventing unnecessary expense to the United States in maintaining them in prison, the Court deemed it proper to order the special session, as it believed it had power to do. But it is now objected, that if this Court has power to order a special session for the trial of criminal causes, it has only the same power which a circuit court of the United States sitting in a State would have ; and as such a court would have authority to order it only for the trial of offences against those laws of the United States which are to operate equally throughout the United States by virtue of the general powers vested in Congress by the Constitution, this Court can only order it for the trial of like offences ; and not for the trial of offences against what are supposed to be the municipal laws of the District of Columbia.

In support of this objection the counsel for the defendant cited the opinion of a very respectable State judge in Virginia, who has recently discharged upon *habeas corpus* a person attached by a process from this Court sitting in Alexandria for not attending as a witness in a criminal prosecution, then pending before the court. Whether that opinion be cited as authority, or as containing matter of argument, it justly deserves great consideration from this Court.

It was cited to support the position, that the powers conferred upon this Court by the 3d section of the Act of the 27th of February, 1801, [2 Stat. at Large, 103,] which refers to the powers of the circuit courts of the United States, can only be exercised in the same cases in which they could be exercised by a circuit court of the United States sitting in a State ; and that as such a court could not exercise them in a case of State municipal jurisdiction, this Court cannot exercise them in a case supposed to be of district municipal jurisdiction.

This seems to be the main ground on which that decision was made ; and although we cannot consider it as authority, we wish it to have all the effect which the reasoning, upon which it is founded, ought to have.

It is admitted in the opinion, (which has been published in the public gazettes,) that, "if the commitment be made by a court having jurisdiction to commit, that court," (that is, the court in Virginia,) "ought not to discharge, although the judgment of the committing court be erroneous."

The judge then proceeds to inquire whether this Court had power to send an attachment into Virginia for a witness who had failed to obey a subpœna, previously served on him. He admits that the Constitution of the United States does vest in Congress the power of arming "their courts with those powers which are

necessary to enable them to discharge their duties ; ” and that in one “ case it imperatively requires that the courts should exercise those powers ; ” for the sixth amendment declares, “ that in all criminal prosecutions the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor.”

The judge also admits that, “ before the establishment of the Constitution, it was well known in every State of the Union what was the nature and character of the compulsory process by which the commands of the courts were enforced.” That “ the process of attachment was a well-established process for that purpose, and when the Constitution vested Congress with the power of establishing courts, the 17th clause of the 18th section,” (of the 1st article,) “ may be fairly understood as vesting them with the power of authorizing those courts to issue attachments, or other process, necessary to carry their orders into effect.”

The judge further observes, “ In our State courts there is no doubt of the existence of the power. We are in the daily habit of imposing fines, or attaching witnesses who refuse to obey the process of subpœna ; and I do not see how courts of justice can perform the business before them without the existence of this or some equivalent power.”

“ But,” continues the judge, “ I have not yet seen any law of Congress which authorizes the circuit courts of the United States in any case to issue attachments to run into another district or State than that in which they are holding their courts. It was deemed necessary to give an express authority by the Act of 1793, [1 Stat. at Large, 89,] to the courts to issue subpœnas into another district or State. The act did not follow up this grant by authorizing attachments to run into another State, in case of disobedience of the process of subpœna. The service of any kind of process from one State in another State was at that time unusual, and if it was necessary that a law should be passed to sanction that practice, it is much more necessary that the more searching and more compulsory process of attachment should be authorized by law. If this case then rested here, I am of opinion that I should be justified in discharging the petitioner, unless some act of Congress can be shown authorizing a circuit court of the United States to issue attachments into another State than that in which it is sitting. But the investigation which has taken place here will probably justify, if it does not require, that I should examine the question whether the Circuit Court of the District of Columbia has a right to issue the process of subpœna beyond the territory of the district, in a case arising under the municipal laws of the district.”

It is the argument of the judge upon this point which has been

urged upon this Court in the present cause. As we understand it, it is to the following effect. In each State there are two sets of courts,—federal courts and State courts. The federal courts can only exercise the jurisdiction expressly granted by the Constitution of the United States. All other jurisdiction is to be exercised by the State courts. The federal courts had power, by the Act of 1793, to send their subpoenas into other districts than that in which they should sit. The State courts had no power to send their subpoenas into the other States. In all cases of municipal jurisdiction, therefore, no subpoena could go out of the State. Congress, in organizing the District of Columbia, might have established two sets of courts in the district, one to exercise the federal jurisdiction, and one to exercise that portion of the municipal jurisdiction which was exercised by the State courts at the time of the transfer of jurisdiction to the United States. If it had done so, one set of the courts would have had power to send its subpoenas out of the district, and the other would not; because, when Congress assumed the jurisdiction over this district, and adopted the laws of Virginia and Maryland as the laws of this district, they also took with them the principle, that no State process could run beyond the limits of the State. Congress, however, established only one court in the district. “But still,” the judge observes, “they kept up the distinction between federal judicial power, and municipal, or *quasi* State judicial power; although they conferred both kinds of power on the same court. Thus, in the first section, they enacted that the laws of the State of Virginia should continue to be the law of one part of the district, and the laws of Maryland of the other.” Those were the municipal laws of Maryland and Virginia, disrobed of the judicial powers which had been conferred exclusively on the federal tribunals; and connected with the principle just mentioned, “that the process of their courts should not issue beyond their territory; and, consequently, the process of the courts of the district, so far as it was required to carry into effect those laws, could not issue beyond the territory of the district.”

“Congress,” (the judge proceeds,) “in thus prescribing for the district a code of municipal laws, intended to act for them in the same character that the legislatures of the several States act towards the people of their States. They had previously provided for them a set of federal laws in common with the rest of the United States.” “Thus the people of the district were immediately provided with two sets of laws, municipal and federal.”

“It then became necessary to provide a court or courts to carry into effect, within the district, as well the federal as the municipal laws. They created one court for the whole district, and vested

it with all the powers by law vested in the circuit courts of the United States." Section 3. "The power conferred by this third section, on the circuit courts of Columbia, is the same with that conferred on other circuit courts, and not greater. What, then, were the powers *quoad hoc* conferred on the other circuit courts? To issue subpœnas into another district, in cases before them of which they had cognizance; that is, in federal, not municipal cases; of these latter they have no jurisdiction, and, therefore, cannot, in such cases, issue subpœnas into another district. But the Circuit Court of Columbia has the same powers with those of the other circuit courts, that is to say, they have the power in federal cases to issue subpœnas to another district; but, in municipal cases, in cases arising under the laws of Virginia and Maryland, they have no such power. To allow them the power in such cases, is not to give them merely all the powers belonging to the other circuit courts, but more than all; which cannot be allowed." The Judge subsequently observes, "This power (the power of exclusive legislation,) consists of two parts: first, the specific given power of federal legislation; and, secondly, the *residuum* of legislative power, which, in other cases, is reserved to the States. This *residuum* is surely as much local as is the legislative power of the States. Congress stands, to the district, in the same relation that the State legislatures do to the respective States. And as a State legislature can only legislate for its own State, and cannot enforce its laws beyond its own limits; so neither can Congress, in legislating for the district, cause its district laws to be carried into effect in the States, without their concurrence.

"In taking this view of the Constitution, I should say that Congress has no right to pass any law directing the process of the courts of Columbia to run into any of the States for the purpose of enforcing the merely municipal laws of the district, though these municipal laws should be enacted or adopted by Congress itself. I do not, however, think that they have, as to this matter, passed such a law."

One of the principal errors of this argument seems to us to have arisen from confounding the powers of a court with the jurisdiction of a court; from using the terms "powers," and "jurisdiction," as synonymous; and affirming of one what is only true of the other. No two ideas can be more distinct than power and jurisdiction. The powers of a court are the means by which it is to exercise its jurisdiction. Power, in the sense in which it is used in the several judiciary acts of Congress, and in the third section of the Act of 27th February, 1801, which establishes this Court, is not jurisdiction, nor is jurisdiction power; and in the acts of

Congress the powers, and the jurisdiction of the courts, are often given in different sections.

In the Judiciary Act of 1789, which was drawn up by Mr. Ellsworth, then a member of Congress, and afterwards Chief Justice of the United States, the powers of the courts of the United States, are given in sections 3, 5, 7, 14, 15, 17, 18, 19, 20, 23, 26, 30, 31, 32, 33; but the jurisdiction of the respective courts is given in sections 9, 10, 11, 12, 13, 21, 22, and 25.

So in the Act of the 13th of February, 1801, (to which this Court is referred for an enumeration of its powers,) the powers of the respective courts are given in sections 2, 7, 8, 9, 10, 15, 18, 24, 26, 30, 31; but their jurisdiction is given in sections 11, 12, 13, 14, 16, 20, 33, and 34.

In the fifth section of the Act of 29th of April, 1802, [2 Stat. at Large, 456,] "to amend the judicial system," the powers and jurisdiction of the circuit courts constituted by that act, are given in the same section, and the same sentence; but the words "power," and "jurisdiction," are both used. The language is, "And the circuit courts, constituted by this act, shall have all the power, authority, and jurisdiction, within the several districts of their respective circuits, that before the thirteenth day of February, one thousand eight hundred and one, belonged to the circuit courts of the United States." By thus using both terms, it is evident that Congress did not consider either of them alone as sufficient to convey the ideas included in both; and that the word power, as applied to a court, did not necessarily include the idea of jurisdiction; nor the word jurisdiction, that of power. Still less does the word "powers," (in the plural,) which is the term used in the grant of the powers of this Court, imply jurisdiction, particularly, if the jurisdiction of the Court, as in the present case, be expressly given in a separate and distinct section.

In the seventh section of the Act of the 29th of April, 1802, it is enacted, that the district courts thereby directed to be holden, "shall, respectively, have and exercise, within their several districts, the same powers, authority, and jurisdiction, which are vested by law in the district courts of the United States."

The Act of the 24th of February, 1807, [2 Stat. at Large, 420,] authorizes the appointment of a sixth Associate Justice of the Supreme Court of the United States, and constitutes a seventh circuit, consisting of the districts of Kentucky, Tennessee, and Ohio; in which circuit courts are erected, and by the third section it is enacted, "That all the authority, powers, and jurisdiction, vested in the several circuit courts of the United States, or the judges thereof, or either of them, shall be, and hereby are vested in, and may be exercised by the several circuit courts of the seventh circuit, and the

judges thereof." And by the first section it is enacted, "That so much of any act or acts of Congress as vests in the district courts of the United States in the districts of Kentucky, East and West Tennessee, and Ohio, the powers, authority, and jurisdiction, of the Circuit Courts of the United States, shall be, and the same is hereby repealed." And by the fourth section it is enacted, that "all the authority, powers, and jurisdiction, vested in the several district courts of the United States, and the judges thereof, in those districts in which circuit courts are now held, shall be retained, and may be exercised, by the several district courts of Kentucky, East and West Tennessee, and Ohio, and the several judges thereof."

By the Act of the 31st of January, 1797, [1 Stat. at Large, 496,] which first established a district court of the United States in the district of Tennessee, it is enacted that the judge of that district "shall, in all things, have and exercise the jurisdiction and powers, which by law are given to the judge of the district of Kentucky."

By the Act of February 19, 1803, [2 Stat. at Large, 201,] erecting a district court of the United States in the district of Ohio, the same jurisdiction and powers are given in the same words.

The same jurisdiction and powers are given in the same words to the District Court of the district of Orleans, by the Act of the 26th of March, 1804, [2 Stat. at Large, 283.]

And to the District Court of the district of Louisiana, by the Act of the 8th of April, 1812, [2 Stat. at Large, 701.]

And to the District Court of the district of Indiana, by the Act of the 3d of March, 1817, [3 Stat. at Large, 390.]

And to the District Court of the district of Mississippi, by the Act of the 3d of April, 1818, [3 Stat. at Large, 413.]

And to the District Court of the district of Illinois, by the Act of the 3d of March, 1819, [3 Stat. at Large, 502.]

And to the District Court of the district of Alabama, by the Act of the 21st of April, 1820, [3 Stat. at Large, 564.]

And to the District Court of the district of Missouri, by the Act of the 16th of March, 1822, [3 Stat. at Large, 653.]

There are several other acts of Congress respecting the courts of the United States, in which the distinction is clearly kept up between the powers and the jurisdiction of the courts.

Two courts, having the same powers, may have very different jurisdictions. A power, given to a court of limited jurisdiction, to issue all writs and process necessary for the exercise of its jurisdiction, is as large as a like power given to a court of more extensive jurisdiction; and if given in the same words, would be the same power. The powers given to a court are given to enable it to exercise its whole jurisdiction, not a part only. It cannot be

understood that Congress intended to give this Court the identical power which it had given to the other circuit courts; for that was a power to be exercised elsewhere; in the other districts of the United States, and not here. And if the word "same," which is relied upon, means identical, as it must, to support the argument, there is as much reason to limit the power to the territorial districts for which it was given, as to limit it to the subjects of jurisdiction for which it was given. The powers given to the circuit courts of the United States were given to enable them to exercise their jurisdiction, in their respective districts. And the powers given to us were given to enable us not to exercise their jurisdiction in their districts, but our own jurisdiction in our own district. In order to give effect to the evident intention of Congress, the powers of the circuit courts of the United States must be coextensive with their jurisdiction, and the powers of this Court coextensive with our jurisdiction. If the powers which are given to this Court are only applicable to that class of cases of which a circuit court of the United States, sitting in a State, would have jurisdiction, we have no powers by which to exercise the residue of our jurisdiction. We have no power to issue a writ in a suit between two citizens of the district; nor, in such a case, to summon a jury; nor to compel the attendance of witnesses; nor to issue execution. The laws of Maryland and Virginia, giving powers to their courts of various descriptions, confer no powers on us. Many cases, indeed, arise under those laws, of which we have cognizance; not, however, by virtue of any power or jurisdiction conferred by those laws upon the courts of Virginia and Maryland, but solely because the grant of powers and jurisdiction to those courts gave rights to parties, out of which cases arise, under the adopted laws, of which this Court has cognizance by virtue of the jurisdiction given to this Court by the acts of Congress. It cannot be supposed, then, that Congress intended to give that restricted sense to the words "all the powers," which would limit the exercise of those powers to that class of cases of which a circuit court, sitting in a State, would have jurisdiction, and leave us entirely without power to exercise by far the larger portion of the jurisdiction which it conferred upon us. Such an idea has never been suggested in this Court, either from the bar or the bench, for the thirty-three years during which this Court has existed.

It has been before observed, that in the argument we have been considering, the terms power and jurisdiction are used as synonymous, and that the error appears to us to have arisen from affirming of one, what is only true of the other.

That the terms were considered as synonymous, and used pro-

miscuously throughout the argument, is evident to any one who reads it. Taking it, therefore, for granted, that they were synonymous, and that what was true of one, might be affirmed of the other, the argument is, in effect, this:

The jurisdiction of the circuit courts of the United States is confined to a certain class of cases. The power of the Circuit Court of the District of Columbia, is the same as that of the circuit courts of the United States. Therefore, the power of the Circuit Court of the District of Columbia is confined to a certain class of cases.

It is evident, that this argument cannot be valid, unless the powers and jurisdiction of a court are identical, and were so understood by the legislature when they passed the Act of the 27th February, 1801. That this was not their understanding, is evident, not only from what has been before observed, but because, after giving the powers in the 3d section, they proceed to give the jurisdiction in the 5th; and that jurisdiction is very different from the jurisdiction given to the circuit courts of the United States.

If the argument were sound, it would equally prove that the jurisdiction of this Court is confined to what have been called federal cases.

The argument would then stand thus: The jurisdiction of the circuit courts of the United States is confined to federal cases. The power of the Circuit Court of the District of Columbia, is the same as that of the circuit courts of the United States. Therefore, the jurisdiction of the Circuit Court of the District of Columbia is confined to federal cases. But it is admitted in the argument, that the jurisdiction of the Circuit Court of the District of Columbia is much more extensive than that of the other circuit courts. An argument which leads to admitted false conclusions, cannot be valid.

We are satisfied, that it was not the intention of Congress to limit our powers by the jurisdiction of the circuit courts of the United States, nor to confine the exercise of those powers to that class of cases which was within the jurisdiction of those courts; but to give us powers coextensive with our jurisdiction. If we have power to issue a *subpœna* for a witness in any case, we have power to issue it in every case within our jurisdiction. If the other circuit courts have power to send a *subpœna* in a criminal case, beyond their districts, we have power to send one beyond our district. If they have power to send their process of attachment beyond their districts, so have we to send an attachment beyond ours. If they have power to hold special sessions for the trial of criminal causes, so have we.

The Act of Congress of the 2d of March, 1793, c. 22, § 6, [1 Stat. at Large, 333,] declares, "That *subpœnas* for witnesses who may be required to attend a court of the United States in any district thereof, may run into any other district, provided that in civil causes, the witnesses living out of the district in which the court is holden, do not live at a greater distance than one hundred miles from the place of holding the same."

And by the Judiciary Act of 1789, [1 Stat. at Large, 73,] it is enacted, "that all the before-mentioned courts of the United States," (including the circuit courts,) "shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs, not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law;" clearly indicating that the powers granted, were the means by which they were to exercise their respective jurisdictions, and that those powers should extend to every case within their jurisdictions.

The authority of the courts of the United States, in criminal causes, to send *subpœnas* for witnesses into any district, is unlimited; the exception of civil causes, confirms the general rule in criminal causes. And, by the 17th section of the said act, power is given to all the said courts of the United States, "to grant new trials," &c., and to punish by fine or imprisonment, at the discretion of the said courts, all contempts of authority in any cause or hearing before the same." If a criminal cause be pending before a circuit court of the United States in any district, it cannot exercise its jurisdiction, and try the cause, without witnesses. It cannot obtain witnesses without issuing a writ of *subpœna*. That writ is necessary to enable it to exercise its jurisdiction, and is agreeable to the principles and usages of law. The court, therefore, has power to issue it. It is a writ commanding the marshal to summon the witness to attend the court. If he refuses to obey the summons, he is thereby guilty of a contempt of the authority of the court. But as the court cannot exercise its jurisdiction without his attendance, another writ becomes necessary; and the only writ agreeable to the principles and usages of law, in such a case, is the writ of attachment founded upon the contempt of the authority of the court, and the power of the court to fine and imprison for that contempt; for, in order to fine and imprison the party guilty of a contempt, he must be brought before the court. The court, therefore, has power to issue the writ of attachment; and it is the only writ applicable to the case, and agreeable to the principles and usages of law. And it is the duty of the court to issue it, whenever it is necessary, to enable the court to exercise its jurisdiction. It is the right of the party, whether that party be

the United States, or an individual, to have compulsory process for his witnesses. And so important was that right deemed, that an amendment of the Constitution of the United States was obtained to secure it to the accused in criminal prosecutions.

And by the Act of the 30th of April, 1790, [1 Stat. at Large, 112,] it is enacted, that "every such person, or persons, accused or indicted of the crimes aforesaid, shall be allowed and admitted in his said defence, to make any proof that he or they can produce, by lawful witness or witnesses, and shall have the like process of the court where he or they shall be tried, to compel his or their witnesses to appear at his or their trial, as is usually granted to compel witnesses to appear on the prosecution against them."

Wherever the witness is in contempt for not obeying the *subpœna*, the writ of attachment must reach him, or the express command of the Constitution will be nugatory. The words of the 6th amendment of the Constitution, in relation to this subject, are, "In all criminal prosecutions, the accused shall enjoy the right" "to have compulsory process for obtaining witnesses in his favor." This amendment was intended to secure the enjoyment of the right to the accused, as some doubt might arise, inasmuch as it was not enjoyed in England; but nobody ever doubted the right of the United States to have compulsory process for their witnesses. The *subpœna* would be nugatory, if it could not be followed by an attachment; and it cannot be supposed that Congress intended to authorize the court to issue a command, the obedience to which it could not enforce. It is clear that the accused has a right to a *subpœna* to run into any district in which his witness may be, and that he has a right, under the Constitution, to have compulsory process for obtaining that witness. It cannot be supposed that an act of Congress is necessary to give him that right; for that would be to give Congress power to withhold a right solemnly granted by the Constitution itself. No act of Congress was necessary to give validity to the right, and no act of Congress could prevent the accused from enjoying it. If, however, an act of Congress was necessary, the 28th section of the Act of the 30th of April, 1790, [1 Stat. at Large, 112,] is such an act.

But although it seems to be admitted that the accused has the right, yet it is denied that the United States have it. This seems to be so unreasonable a doctrine, that the law ought to be very plain that should justify it. One would hardly believe that the construction of the Constitution, and of the act of Congress which could lead to such a conclusion, could be correct.

The argument in support of it, is this:—

The Act of 1793, which provides that *subpœnas* for witnesses

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may run into any other district, &c., is evidence that they could not so run before that act; and as an act of Congress was necessary to enable them so to run, an act of Congress is equally necessary to enable writs of attachment for disobedience of such subpœnas to run into any other district, &c.

But this is not a necessary consequence. In one case, an act might be necessary to remedy an evil, or to supply a defect, or to remove a doubt; but, in the other, there might be no evil to be remedied, no defect to be supplied, and no doubt to be removed.

The evil to be remedied by the 6th section of the Act of 2d of March, 1793, [1 Stat. at Large, 333,] was the uncertainty whether the circuit court could lawfully summon a witness who resided out of the district in which the court sat; and whether, if summoned, the witness was bound to obey the summons. But there was no uncertainty, whether, if the witness were lawfully summoned, and bound to obey the summons, the court could compel him to attend. There was a reason, therefore, for passing an act ascertaining the power of the court to send its summons out of its district, and the consequent obligation of the witness to obey it; but none for giving further powers to the court to compel obedience to its lawful commands.

If the Act of 1793 is evidence that an act of Congress was necessary to enable the court to send its subpœna into other districts, the omission of Congress, to pass an act authorizing the court to follow up its subpœna, by an attachment, for not obeying it, is equally evidence that no such act was necessary, and that the court already possessed the power.

All that the court wanted was lawful authority, in a criminal cause, to command the attendance of a witness who resided out of the District. It had already all the power necessary to enforce its lawful commands.

But, it is said, that, when Congress organized this District, there were, in each State, two sets of courts, namely, federal courts, exercising federal powers, and State courts, exercising municipal powers. That the federal courts had the power to send subpœnas beyond the limits of the State, but the State courts had not. That the distinction between the subjects of jurisdiction of these courts was in view of Congress, when they were adopting a system of laws for the District. That "it was in their power to have two sets of courts, as in every other part of the United States; that is, one court to be vested with federal powers, another court, with municipal powers. But, that the size of the territory and the number of people did not require such a division of courts, and that considerations of economy, probably, forbade the appointment of so many judges; and that

they therefore decided on having only one court. But still, (it is said,) they kept up the distinction between federal judicial power, and municipal, or *quasi* State judicial power; although they conferred both kinds of power on the same court." The fact relied upon to support the assertion, that Congress, in granting jurisdiction to this Court, still kept up the distinction between its federal and its municipal jurisdiction, is, that Congress adopted the laws of Maryland and Virginia, as they then existed, as the laws of this District. "That it was a fixed principle of those laws, that the process of their courts should not issue beyond their territory;" "that, when those laws were adopted, that principle was adopted with them, and, consequently, that the process of the courts of that District, so far as it was required to carry into effect those laws, could not issue beyond the territory of the District."

It has been before observed, that this Court derives no part of its powers or jurisdiction from the laws of Virginia or Maryland, thus adopted; nor can those laws, in any manner, limit or abridge the powers or jurisdiction of this Court. If that be the case, there is no pretence for saying, that Congress, in granting powers and jurisdiction to this Court, "kept up the distinction between federal judicial power, and municipal, or *quasi* State judicial power." The terms in which our powers and jurisdiction are given, and which have been already recited, indicate no such distinction; nor is it intimated or suggested in any subsequent act of Congress. Nor could it be; for no such distinction exists in this District. That distinction is only applicable to the federal powers, as exercised within the States. Here it is all federal power and federal jurisdiction. In the States there is federal jurisdiction and State jurisdiction, and it is necessary to keep up the distinction, and draw the line between them. But here there is no danger of collision. Here are no conflicting State rights. Here is no government but that of the United States; no executive but that of the United States; no Legislature but that of the United States; and no judiciary but that of the United States. All the powers, authority, and jurisdiction exercised here, are as much, and as purely federal, as the powers, authority, and jurisdiction exercised by the United States, within the respective States.

This District is wholly federal. It is the creature of the Constitution of the United States. It is the seat of the government of the United States. The reasons for providing such a district are to be found in the history of the Congress of the confederation, who found, by experience, that they could not rely upon a State government for protection from insult, and who felt themselves degraded by being obliged to sue for protection to the

State authorities. The framers of the Constitution, therefore, provided for a national district, to be under the sole and exclusive legislation of Congress, where every member might feel that he was standing upon his own ground; where the officers of the national government might be protected by the national power; where every citizen of the United States who may have business to transact with the national government, or its officers, may be sure of protection, and where all the citizens of the United States may meet upon a common ground, and feel that they have equal rights. The Constitution of the United States gave to Congress the exclusive legislation; and the States of Virginia and Maryland ceded the territory. No portion of the State sovereignty or jurisdiction remained in or over the ceded district. The only sovereignty in the District is that of the United States. The only laws that are or can be of force in the District, are the laws of the United States. The laws of Maryland and Virginia, which were adopted by the Act of Congress of the 27th of February, 1801, [2 Stat. at Large, 103,] do not operate here *proprio vigore*, but solely by virtue of the act which adopted them in mass, instead of enacting them *totidem verbis*. Such of those laws only can be considered as adopted as were applicable to the circumstances of the District; such as were local in their nature and operation; and such as were applicable only to State officers, or State courts, could not operate here, because the subjects upon which they were to operate did not exist here. That Congress did not understand that the court could derive any powers from the laws of Virginia and Maryland, which granted powers to their State courts, is evident, from their having, by the Act of the 3d of March, 1801, [2 Stat. at Large, 115,] (only six days after passing that of 27th of February, 1801, [2 Stat. at Large, 103,] which adopted those laws,) expressly enacted, "That the circuit courts for the District of Columbia shall be, and they are hereby invested with the same power respecting constables, inspectors; and the inspection of tobacco and flour, surveyors, mills, highways, and ferries, for the county of Alexandria, as have heretofore been invested in the county courts of Virginia, and for the county of Washington, the same power and authority as have been heretofore exercised by the county and levy courts of the State of Maryland, with power to appoint to all other offices necessary for the said District, under the respective laws of Maryland and Virginia." And by the 3d section of the same Act of the 3d of March, 1801, [2 Stat. at Large, 115,] it is enacted, that "the circuit court for the said county of Alexandria shall possess and exercise the same powers and jurisdiction, civil and criminal, as is now possessed and exercised by the district courts of Virginia."

These provisions show clearly that this Court could not derive powers or jurisdiction from the laws of Virginia and Maryland, granting powers and jurisdiction to their courts; and, it seems to follow, that our powers and jurisdiction could not be limited or abridged by any law of either of those States, limiting or abridging the power or jurisdiction of their own courts. If, therefore, there had been any law of the State of Virginia expressly forbidding its courts to send its subpœnas for witnesses beyond the limits of the State, it would impose no restriction upon the power of this Court to issue its subpœnas beyond the limits of the District. There is, however, no such express law of Virginia. That State has laid no such restraint upon herself. It is a restraint imposed upon her by other sovereign States. But it is said to be "a fixed principle of those laws," (that is, of the municipal laws of Virginia and Maryland,) "that the process of their courts should not issue beyond their territory." It is not, however, a principle of the municipal laws of Virginia, except so far as the law of nations may be considered as a part of those municipal laws. It is a restriction imposed upon sovereigns, by the law of nations, and results from the principle of equality among sovereign States. The rule is, that all sovereigns are equal, and that no one can exercise any authority within the territory of another, without his consent. It is the mutually repellant power of each that supports the rule, and not the municipal law of either. It was not a principle which could be applied to the District of Columbia, unless that District were a sovereign co-equal with Virginia, (which is not the case.) The sovereign of the District of Columbia is the United States; and if the principle is applicable at all, it must apply to the United States and Virginia, not to the District of Columbia and Virginia. But Virginia, by adopting the Constitution of the United States, has given permission to the courts of the United States to send their process into Virginia, in all cases of which the judicial power of the United States has cognizance; and it is admitted, in the argument, that a circuit court of the United States, sitting in another district, composed of another State, has power to send its *subpana* into the district of Virginia; but it is denied that a circuit court of the United States, sitting in the District of Columbia, has any such power, except in cases supposed to be of purely federal jurisdiction; and we are thus brought back to that point, a part of the argument in support of which has been already considered.

It seems clear to us, that it cannot be supported upon the principle, that the process of one State cannot run into another; because the District of Columbia is not a State; and because, as between the State of Virginia and the United States, the principle

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is yielded by Virginia as to all the jurisdiction given to the United States by the Constitution.

Nor is it supported by any supposed distinction between our powers in relation to our supposed federal and municipal jurisdiction; for it is all federal.

It is admitted in the argument that this Court has the power to send its subpœna into another district "in federal cases;" and among the admitted federal cases are "all cases arising under the Constitution and laws of the United States;" and "controversies to which the United States shall be a party."

Mr. Chief Justice Marshall, in delivering the opinion of the Supreme Court of the United States in *Cohen's case*, (6 Wheat. 379,) says, "a case in law or equity consists of the right of the one party as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either."

All cases arising in the District of Columbia are cases arising under the Constitution and laws of the United States; for there are no other laws in force in the district than the laws of the United States; no other sovereignty to be offended than that of the United States. All crimes and offences committed in that district are offences against the United States, and every prosecution therefor is a controversy to which the United States is a party. Every case therefore arising in the district, is a federal case, and therefore, according to the admission of the argument, this Court has a right to send its subpœna into another district in all cases. In criminal cases to any distance; in civil, to the extent of one hundred miles. And such has been the unquestioned practice of this Court ever since its establishment in 1801.

But there is another ground taken in the argument, which also deserves consideration.

It is said that "Congress stands to the district in the same relation that the State legislatures do to the respective States; and as a State legislature can only legislate for its own State, and cannot enforce its laws beyond its own limits, so neither can Congress, in legislating for the district, cause its district laws to be carried into effect in the States, without their concurrence."

This proposition might be admitted; for the power claimed is not to enforce in Virginia the laws enacted for the District of Columbia, but to enforce them within that district; and so far as regards the necessary means of so enforcing them, Virginia has given her consent by adopting the Constitution of the United States which, it is admitted in the argument, "does vest in Congress the power of arming their courts with those powers which are necessary to enable them to discharge their duties." "And

when the Constitution vested Congress with the power of establishing courts, the seventeenth clause of the eighth section " (of the first article,) " may fairly be understood as vesting them with the power of authorizing those courts to issue attachments, or other process necessary to carry their orders into effect."

But it cannot be admitted that Congress in legislating for the district is, in relation to the States, restricted by that rule of the law of nations which prevents one sovereign from sending his process into the territory of another. If such be the law a governor of Virginia may visit the seat of government of the United States. He may be way-laid by some enemy from Virginia, and insulted, or beaten, or murdered in the District of Columbia and in five minutes, the offender and the witnesses may escape into Virginia ; where, if such be the true construction of the Constitution, the offender can neither be arrested nor tried, and from whence, the witnesses cannot be compelled to come and testify in the only tribunal that has cognizance of the offence.

The same thing would happen, in places purchased by the consent of a State legislature for a fort or magazine, an arsenal or a dock-yard, over which Congress has the same power of exclusive legislation that it has over this district. Every fort and dock-yard would be a petty sovereignty, and restricted by the law of nations from sending its process into the neighboring States, although its sovereign was the United States.

But it has been decided by the highest tribunal in the United States that " this power " (of exclusive legislation over the district,) " like all others which are specified, is conferred on Congress as the legislature of the Union ; for, strip them of that character, and they would not possess it. In no other character can it be exercised. In legislating for the District they necessarily preserve the character of the legislature of the Union ; for it is in that character alone that the Constitution confers on them this power of exclusive legislation." " The clause which gives exclusive legislation, is unquestionably a part of the Constitution, and as such binds all the United States." This is the language of Chief Justice Marshall in delivering the unanimous opinion of the Supreme Court of the United States in *Cohen's case*, 6 Wheaton, 424. After answering an argument drawn from the analogy, of the double power of legislation (as it was supposed to be) vested in Congress, to the double jurisdiction of a court which exercises jurisdiction at common law and in equity, the chief justice proceeds thus : " Since Congress legislates in the same forms, and in the same character, when exercising its exclusive powers of legislation, as well as when exercising those which are limited, we must inquire whether there be any thing in the nature of this exclusive legislation which necessarily confines the operation of

the laws, made in virtue of this power, to the place with a view to which they are made.

“Connected with the power to legislate within this District, is a similar power in forts, arsenals, dock-yards, &c. Congress has a right to punish murder in a fort, or other place within its exclusive jurisdiction; but no general right to punish murder committed in any of the States. In the act for the punishment of crimes against the United States, murder committed within a fort, or any other place, or district of country under the sole and exclusive jurisdiction of the United States, is punished with death. Thus Congress legislates in the same act, under its exclusive and its limited powers. The act proceeds to direct that the body of the criminal, after execution, may be delivered to a surgeon for dissection; and punishes any person who shall rescue such body during its conveyance from the place of execution to the surgeon to whom it is to be delivered. Let these actual provisions of the law, or any other provisions which can be made on the subject, be considered with a view to the character in which Congress acts when exercising its powers of exclusive legislation. If Congress is to be considered merely as a local legislature, invested, as to this object, with powers limited to the fort, or other place, in which the murder may be committed, if its general powers cannot come in aid of these local powers, how can the offence be tried in any other court than that of the place in which it has been committed? How can the offender be conveyed to, or tried in any other place? How can he be executed elsewhere? How can his body be conveyed through a country under the jurisdiction of another sovereign, and the individual punished, who, within that jurisdiction, shall rescue the body? Were any one State of the Union to pass a law for trying a criminal in a court not created by itself, in a place not within its jurisdiction, and direct the sentence to be executed without its territory, we should all perceive and acknowledge its incompetency to such a course of legislation. If Congress be not equally incompetent, it is because that body unites the powers of local legislation with those which are to operate through the Union, and may use the last in aid of the first; or because the power, of exercising exclusive legislation, draws after it, as an incident, the power of making that legislation effectual; and the incidental power may be exercised throughout the Union, because the principal power is given to that body as the legislature of the Union.

“It is clear that Congress cannot punish felonies generally; and of consequence cannot punish misprision of felony. It is equally clear that a State legislature, the State of Maryland, for example, cannot punish those who in another State, conceal a felony committed in Maryland. How then is it that Congress,

legislating exclusively for a fort, punishes those who, out of that fort, conceal a felony committed within it? The solution, and the only solution, of the difficulty, is, that the power vested in Congress, as the legislature of the United States, to legislate exclusively within any place ceded by a State, carries with it, as an incident, the right to make that power effectual. If a felon escape out of the State in which the act has been committed, the government cannot pursue him into another State and apprehend him there, but must demand him from the executive power of that other State. If Congress were to be considered merely as the local legislature for the fort or other place in which the offence might be committed, then this principle would apply to them as to other local legislatures; and the felon who should escape out of the fort, or other place in which the felony may have been committed, could not be apprehended by the marshal, but must be demanded from the executive of the State. But we know that the principle does not apply; and the reason is, that Congress is not a local legislature; but exercises this particular power, like all its other powers, in its high character as the legislature of the Union. The American people thought it a necessary power, and they conferred it for their own benefit. Being so conferred, it carries with it all those incidental powers which are necessary to its complete and effectual execution." See also 12 Peters, 619, 636, 648.

Nothing need be added to the force of this reasoning, and nothing can impair it. Being the unanimous opinion of the highest judicial tribunal of the country, it conclusively settles the law upon that point.

If it were not so; if Congress has not the necessary power to carry into effect its exclusive legislation over this District, but is limited to the powers of a local municipal legislature, what security has the government here, more than it would have in one of the States? Every member of the executive department whose duties require his residence in the District; every member of Congress; every Judge of the Supreme Court; and every citizen of any of the States, who may visit the seat of government, is liable to every sort of personal injury and insult, with little prospect of redress, if the offender or the witness is disposed to step over the line of the District. Such a construction of the Constitution would defeat the great object which the people of the United States had in view when they provided for a seat of the national government; and, therefore, cannot be correct.

We have thus examined what we understand to be the argument to support the position, that the powers given to this Court by the third section of the Act of Congress of the 27th of February, 1801, [2 Stat. at Large, 103,] can only be exercised in that

class of cases which is within the jurisdiction of a circuit court of the United States, sitting in one of the States; and are satisfied that the foundations of that argument are not sustainable. We are satisfied that Congress, in exercising its exclusive power of legislation over this District, does not act in the character of a mere local legislature, and is not restrained by any rule of State legislation, or municipal legislation, from giving full effect to that power, by all the means which are within its general powers of legislation on the other matters submitted by the Constitution to its jurisdiction. We are satisfied that all the powers of this Court are equally applicable to all cases within its jurisdiction; that all cases within its jurisdiction, are cases arising under the Constitution and laws of the United States. And that all criminal prosecutions for offences committed in this District, are controversies to which the United States is a party; and, therefore, are strictly of federal cognizance. We are, therefore, satisfied that the power of this Court to hold special sessions for the trial of criminal causes, is equally applicable to all criminal causes arising in the District, whether they consist of offences against laws of the United States applicable to the whole territory of the United States, or against laws applicable only to the District of Columbia.

There has been, however, another objection urged by the defendant's counsel to the jurisdiction of the Court in this case.

It is, that the Court, at a special session, can try those causes only which existed at the time of the order for holding it.

The terms in which the power is given do not indicate such a restriction. The words in the fifth section of the Judiciary Act of 1789, are, "And the circuit courts shall have power to hold special sessions for the trial of criminal causes, at any other time, at their discretion."

But it has been argued from the nature of the power, that there must be causes to try at the time of the order for holding the court, or it might happen that there would be none to try when the court should be held; and that if the order be founded upon the existence of causes at the time of the order, it should be limited to the trial of those causes only. This construction of the law, is said to be corroborated by the terms used in the third section of the Act of the 2d of March, 1793, which authorizes the Supreme Court, or a justice thereof and the district judge, "to direct special sessions of the circuit courts to be holden for the trial of criminal causes at any convenient place within the District, nearer to the place where the offences may be said to be committed, than the place or places appointed by law for the ordinary sessions, and requires the clerk to give thirty days' notice of the time and place for holding the same; and provides, "that all process, writs, and recognizances, of every kind, whether

respecting juries, witnesses, bail, or otherwise, which shall relate to the cases to be tried at the said special sessions, shall be considered as belonging to such sessions in the same manner as if they had been taken in reference thereto."

The Act of 1789, [1 Stat. at Large, 73,] only authorized the Circuit Court when in session, to order special sessions. The Act of 1793, [Id. 333,] authorized the Supreme Court, or a judge thereof, and the district judge, out of court, to order them.

The Act of 1789 only authorized them to be holden at a different time. The Act of 1793 authorized the holding of them at a different place, and that place was to be nearer to the place where the offences may be said to be committed. The place, therefore, where the offences were said to be committed, must (it is said) be ascertained before the order for a special session can be made under this act; and, of course, the offences must have been committed. Subsequent offences, committed after the order for such a special session, may not have occurred at the same place, but, perhaps, at a place as far removed from the ordinary place of session in an opposite direction; and it is said that it can hardly be supposed that it was the intention of Congress to give the special session jurisdiction of such subsequent case; and if not of such a subsequent case, it cannot be presumed that they meant to give it jurisdiction of any subsequent case; for it would be impossible to draw the line; and the court could not say how near to the place of session the subsequent case must have occurred, to bring it within the jurisdiction of the session, unless that line should be prescribed by law.

The provision, in the same section, that the process, writs, recognizances, &c., "which relate to the cases to be tried at the said special sessions, shall be considered as belonging to such sessions in the same manner as if they had been issued or taken in reference thereto," it is said, supposes a definite number of cases, and that the process, writs, recognizances, &c., had been issued or taken before the order for the special session; for if issued and taken after that order, and if the special session had cognizance of them, they would be issued and taken in reference thereto. It is said, also, that the provisions of the fifth section of the Act of 1789, [1 Stat. at Large, 73,] and the third section of the Act of 1793, [Id. 333,] respecting the power of ordering special sessions, being *in pari materiâ*, should have a similar construction; and as the power given by the Act of 1793, seems to be confined to special sessions for the trial of causes existing at the time of making the order for holding them, the power given by the Act of 1789, should be confined in the same manner.

The answer to this argument is not difficult.

The special session in the present case, was ordered under the Act of 1789, and not under the Act of 1793. Those two acts, are not *in pari materia*, so far as relates to the cases which may be subject to the cognizance of the special sessions which may be holden under each law respectively. A special session under the Act of 1789, has cognizance of criminal causes arising in any part of the district; but a special session under the Act of 1793 has cognizance only of offences committed in a part of the district nearer to the place of special session than to the place of ordinary session. Although it may be necessary, as well under the Act of 1789 as under that of 1793 that there should be criminal causes for trial at the time of making the order for a special session, yet there is nothing in the Act of 1789, as there seems to be in the Act of 1793, from which an inference can be drawn, that the Circuit Court, when holding a special session under the Act of 1789, cannot exercise its general jurisdiction over all criminal causes arising within the district, and existing at the time of holding the same, whether existing or not at the time of making the order for the special session.

The Act of 1793 provides only for cases in a certain part of the district, remote from the ordinary place of trial; and although it may be necessary, under that act, that some such cases should exist at the time of making the order for the special session, yet it does not follow, that if like cases should arise in the same part of the district after the order and before or during the special session, the court would not have power and jurisdiction to try them at the same special session. Such cases would fall within the reason of the act; which, undoubtedly, was the promotion of the mutual convenience of all the parties, jurors, and witnesses, and the saving of time and expense; and the provisions of the act, that the writs, process, recognizances, &c., should be considered as belonging to such special sessions in the same manner as if they had been issued and taken in reference thereto, will be fully satisfied by applying it to the writs, &c., issued in the cases existing at the time of the order for the special session; and cannot be applicable to cases arising after such order, because the writs, &c., in such cases would be issued and taken in reference to the special session. If the case arose nearer to the place appointed for the special session than to the place of ordinary session, it would be a case for the trial of which a special session might be ordered; and as a special session was already called for the trial of like causes, there could be no reason why that special session should not have cognizance of the cause. If the case arose further from the place of special session than from the place of ordinary session, it might

be that such special session would not have cognizance of it for that reason; but it would not follow that such special session would not have cognizance of a case arising nearer to the place of such special session than to that of the ordinary session. There is nothing therefore in either of the two acts of Congress, which prohibits a special session holden under either of them to take cognizance of criminal causes arising after the making of the order for holding such special session.

Nor is there any thing in the Act of 1789 which prevents a circuit court, when holding a special session under that act, from exercising its jurisdiction over all offences arising within the district, excepting those for which prosecutions had been commenced and were pending in a previous stated session; which causes, so pending in a previous stated session, this Court, as well as other courts of the United States, have decided were not cognizable in a subsequent special session.

The clause of the Act of 1789, which gives to the circuit courts power to hold special sessions, is the last sentence of the 5th section; the whole preceding part whereof is occupied in designating the times and places of holding the circuit courts in the respective districts. After prescribing the days on which they should be holden in each district, the words are, "And the circuit courts shall have power to hold special sessions for the trial of criminal causes at any other time, at their discretion, or at the discretion of the Supreme Court."

The court, when sitting on any day prescribed by the act, could undoubtedly exercise its whole jurisdiction over all criminal causes arising within the district up to the very day of, and even during its session. The clause which gives the power to hold special sessions only authorizes the court to add a session to those previously designated in the same section, without in any manner abridging its powers or jurisdiction when so holden.

It has, indeed, been suggested that the clause of the Act of 1789, giving the power to hold special sessions, is repealed by the Act of 1793.

But there is no ground to support such a suggestion. Both acts may well stand together. There is no repugnancy between them. The Act of 1789 regards only the time; that of 1793, the place. By the former a special session could be ordered by the court only; by the latter, it may be ordered by judges out of court. The Act of 1793, so far from disclosing any intention of repealing that of 1789, on this subject, expressly declares, "that the district courts of Maine and Kentucky shall have the like power to hold special sessions for the trial of criminal causes as hath been heretofore given, or is hereby given, to the circuit courts, subject to the like restrictions and regulations."

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It has also been objected that thirty days' notice was not given, by the clerk, of the time and place of holding the special session in September. But that is only necessary when the place of holding the session is changed, and the session is ordered by the Supreme Court, or by a judge thereof and the district judge. That provision does not apply to the special sessions ordered by the Circuit Court itself under the Act of 1789.

Upon the whole, we see no reason to doubt of the jurisdiction of the Court in the present case. The motion to quash the indictment is therefore overruled.

G. C. GRAMMER v. WILLIAM THOMAS CARROLL.

The defendant, the acceptor of a bill payable to the plaintiff out of an expected particular fund, received the fund, but paid it to the holder of a subsequent draft by the same drawer; held, that the defendant was liable to the plaintiff in an action for money had and received to his use.

Interest may be given as damages for the non-payment of money received by the defendant to the plaintiff's use after demand and refusal.

ASSUMPSIT for money had and received. R. G. Lanphier, Jr., having made a seal for the Supreme Court of the United States, of which court the defendant was clerk, and being indebted to the plaintiff, drew the following bill:

Washington, October 11, 1831.

Mr. Carroll, Clerk of the Supreme Court of the United States. Pay G. C. Grammer, or order, on the 1st day of April next, the sum of \$80, out of any money that may come into your hands as clerk, on account of a seal made by me for the office of said court. \$80.

R. G. LANPHIER, JR.

Indorsed: Accepted, William Thomas Carroll, C. S. C. U. S.

Mr. Lanphier afterwards drew another bill on Mr. Carroll for \$100, being the whole price of the seal, in favor of Mr. Middleton, Mr. Carroll's clerk, who was a creditor of Lanphier, and who was said to be insolvent. Mr. Carroll having certified on the bill, that the seal had been made, and that the money was due to Lanphier, Mr. Middleton took it to the marshal, and got his due-bill for the amount, payable in ten days, which he gave to Mr. Carroll, who received the money from the marshal, and paid it over to Mr. Middleton; but before he paid it, Mr. Middleton had notice of Mr. Carroll's acceptance of the draft in favor of the plaintiff.

Upon the trial, *Mr. Coxe*, for the defendant, moved the Court to instruct the jury, in substance, that the plaintiff cannot recover

without satisfying them that the money came to the defendant's hands, as clerk.

But the COURT (CRANCH, C. J., *contra*,) refused to give the instruction; because, if the defendant had a right to draw it from the marshal, the money was, in effect, in the defendant's hands.

The COURT, (THRUSTON, J., absent,) at the prayer of the defendant's counsel, instructed the jury, that the plaintiff cannot recover in this action on the count for money had and received, unless the jury should be satisfied by the evidence that the defendant received the money to the plaintiff's use.

Verdict for the plaintiff, \$81.75, to bear interest from the 4th of April, 1832.

Mr. Coxe, for the defendant, moved for a new trial, upon the ground that upon the count for money had and received, the jury had given interest by way of damages; and the cost of protest of the defendant's acceptance, which was not given in evidence upon the special counts, which were abandoned, and cited several cases.

But the COURT said, that in this Court, the jury had always been allowed to give damages for the non-performance of the contract; and that it was competent for them to make the interest the measure of their damages; and that interest may be recovered on money received to the plaintiff's use, after demand and refusal to pay.

Upon the plaintiff's remitting the cost of protest, the COURT refused to grant a new trial.

THOMPSON F. MASON v. RICHARD B. MASON.

An indorser, who has been obliged to take up a note indorsed by two previous indorsers, for the accommodation of the maker, may recover the whole amount from either of the two accommodation indorsers.

THE plaintiff indorsed a note, (as town indorser,) already indorsed by two others, for the accommodation of the maker; and at maturity was obliged to take it up.

The COURT held, that the plaintiff may recover of the first indorser the whole amount paid to take up the note.

UNITED STATES v. JOSEPH L. KUHN.

An account, although duly authenticated according to law, is not, *per se*, evidence of a balance due on a former account, nor of items transferred from the account of any other person; nor of items recharged, which had before been credited.

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From the fact that the defendant objected to certain items of *debit* in the account, and was silent as to the other items, the jury may, and ought to infer, that he acquiesced in the items not objected to; unless they should be satisfied that he did not so intend; the burden of proof of which is on the defendant.

The jury may infer that the defendant claimed no credits but what are stated in the "reconciliation;" and ought so to infer, unless the defendant can show that there were other credits claimed by him, or to which he is entitled.

If the United States produce in evidence the defendant's account current, showing a balance in his favor, he is entitled to a verdict in his favor, unless the plaintiff shall prove errors, or omissions in that account, which shall turn the balance the other way.

To rebut such *primâ facie* evidence, it is not sufficient to show, that certain claims of the defendant were suspended by the proper accounting officers, on the coming in of the accounts current containing them, and were subsequently disallowed; and that no such claim had been previously allowed by any Secretary of the Navy.

The defendant claimed a credit of \$4,480.13, for commissions at 5 per cent. on money disbursed by him for the Quartermaster's Department.

The amount of the disbursement was proved by the accounting officer of the treasury; and upon the back of the document produced by the United States, and containing the defendant's claim for that credit, was an indorsement by the Fourth Auditor, dated 2 March, 1829, that he had been verbally directed by the then Secretary of the Navy, to allow the claim, it being for extra official service.

The Court held, that, to rebut this evidence, it was not sufficient to show that a subsequent Fourth Auditor referred the claim to a subsequent Secretary of the Navy, who rejected it; and that there was no evidence that such commissions had been allowed in any like case, and that no precedent could be found for it in the proceedings of the department.

And the Court also held, that, in order to rebut the *primâ facie* evidence arising from the production and giving in evidence by the United States of the defendant's account containing the charge, it is incumbent on the United States to satisfy the jury that the charge was such as the Secretary of the Navy ought not to have allowed.

The Court instructed the jury, in effect, that if the Secretary of the Navy did not order the Fourth Auditor to allow the specific sum claimed, but only to make such allowance as, on examination, he should find to have been made in similar cases, they should, from a consideration of all the evidence, make such allowance as they should find had been usually made in similar cases; and if it should appear that no such allowance had been made in any similar case, then to make such as they should deem reasonable.

And the Court further instructed the jury, in effect, that the secretary had a right to order the Fourth Auditor to make such allowance; and if made by him, under such order, it amounted, in law, to an actual allowance by the secretary himself.

And further, that if the Secretary of the Navy did authorize the allowance of the claim, and the accounting officers omitted to pass the same, without any default of the defendant, then the defendant is entitled to such allowance, unless it was made by fraud, imposition, or misapprehension of the facts of the case.

The paymaster of the marine corps was not, by law, entitled to the pay of a major in the general staff, nor of a major in the cavalry from November, 1821, to October, 1830.

Up to the year 1828, he had received the pay and emoluments of a major in the infantry; and this was continued to him until 1831, by the resolution of May, 1830.

The books of account of a paymaster are to be considered so far public books, as to authorize the United States to use them in evidence.

After a credit has been given by the United States, and the account settled, it is not competent for the United States to open the account and revoke such credit, unless it were originally given by fraud, imposition, or mistake.

THIS was an action brought by the United States for the balance (\$21,966) against the defendant, as paymaster of the marine corps.

United States v. Kuhn.

Mr. Key, for the United States, offered an account stated in the Treasury Department, authenticated according to law, and commencing with a balance of a former account.

Mr. Coxe, for the defendant, objected that it was not evidence to charge the defendant with that balance. This point was decided in the case of the *United States v. Jones*, Administrator of Orr, 8 Peters, 375, by the Supreme Court of the United States at their (then) present term. See also the case of *United States v. Buford*, 3 Peters, 12.

Mr. Key, in reply. "The reconcilements" are evidence, because they are settlements by the proper accounting officers; and are admissions by the defendant that he claims so much, and that so much has been rejected, and so much allowed.

The COURT (*nem. con.*) decided that the account was not admissible evidence, *per se*, to charge the defendant in this action. It consisted only of balances per Report, No. 2436, &c., and two items, to wit:

To Charles Grymes, Lt. Marines, for	\$13.65
To A. A. Nicholson, " " "	90.00
	\$103.65

These two items were understood as having been charged first to Grymes and Nicholson, and transferred to the *debit* of Kuhn.

Mr. Key then offered the various accounts settled at the treasury, from 1821, when Captain Kuhn was appointed paymaster, to 1830, (14 in number.)

No objection being made, they were read to the jury, constituting a continuing account.

Mr. Coxe objected to the following item in the account No. 10, which had been passed to the credit of Kuhn by the officers of the Treasury in 1823:

Amount of stoppages for allowances made by his predecessor, Mr. Desha, \$60,667.92.

And to the following item in the account No. 11:

To Desha, pay-rolls recharged, which had been credited in 1823, \$9,925.89.

And prayed the Court to instruct the jury, that the said accounts Nos. 10 and 11 are incompetent and insufficient of themselves to establish any of the items of charge therein contained against the defendant of \$7,564.13; and \$3,455.44 in the first page of the account No. 10; and \$3,657.94 in the account marked N. S. 1325, and other similar items, which are not charged against the defendant as money paid to and received by him from the treasury.

Which instruction the Court gave, (*nem. con.*) upon the authority of the case of the *United States v. Orr's Administrator*, at the (then) present term of the Supreme Court of the United States. To this opinion no exception was taken.

Mr. George Gillis, an accounting officer of the Treasury Department, having been examined on the part of the United States to show that the "general reconciliation" exhibited the whole of the matters in controversy, and that the defendant acquiesced in all the charges against him except certain disputed items,

Mr. Butler, the Attorney-General, prayed the Court to instruct the jury,

1. That from the evidence aforesaid, the jury may infer and presume that the defendant admitted all the charges to the 8th of October, 1830, except those specially excepted to as stated in the reconciliation annexed to the account No. 11; and that unless the defendant shall satisfy the jury that he did not intend to make such admission, it will be their duty so to infer and presume.

2. That from the evidence aforesaid the jury are at liberty to infer and presume that the defendant claimed no credits other than those allowed to him in the said accounts or stated in the reconciling statement annexed to the said account No. 11; and unless the defendant shall satisfy the jury that he did intend to insist on other claims before exhibited and rejected and not included in the last reconciling statement, it will be their duty so to infer.

This opinion was given with the understanding that the defendant's account current of the 8th of October, 1830, was in the proper office in the Treasury Department; but it appearing that it could not be found, the Court required the United States to prove the debit side of the account by the original vouchers filed in the department.

Mr. Coxe then contended that as the United States had produced the defendant's accounts current, in evidence, which contained the charge of the disputed items, they have so far admitted their correctness as to take upon themselves the burden of disproving them; and prayed the Court so to instruct the jury; and cited *Goodenow v. Travis*, 3 Johns. 427; *Hotchkiss v. LeRoy*, 9 Johns. 141; *Hopkins v. Smith*, 11 Johns. 161; *Whitwell v. Wyer*, 11 Mass. Rep. 10; *Morris v. Hurst*, 1 Wash. C. C. R. 433; *Bell v. Davidson*, 3 Wash. C. C. R. 333; *Randall v. Blackburn*, 5 Taunt. 245; S. C. 1 Sarg. & L. 92.

The Attorney-General admitted the principle as to matters of fact; but not as to matter of law; nor as to government cases. This Court, and the Supreme Court have so decided in the cases against *Orr's Administrators*, so far as regards the defendant. They permitted him to rely on the account of the United States for the credits therein given to him, without obliging him to admit the debits against him in the same account.

But the government does not rely on the defendant's account

alone; they have also the testimony of Mr. Gillis. The government have not admitted this item, (the charge of five per cent. for commissions.)

One argument adduced by *Mr. Jones* in those cases was that the defendant there had surrendered his vouchers, which differed it from the common case. Here the United States objected to the claim when first presented, and ultimately rejected it.

Mr. Coxe's prayer, and the objection of the plaintiffs, was as follows:

The defendant prayed the Court to instruct the jury that, as the United States had given in evidence the accounts current of the defendant, by the last of which it appeared that there was a balance of \$9,107.51 in favor of the defendant, he is entitled to the verdict of the jury upon such evidence, unless the plaintiff shall further prove errors or omissions in said accounts which, shall destroy such balance in his favor, and show, after such rectification, a balance against him in favor of the plaintiffs.

To which the plaintiffs objected, because the accounts settled by the proper accounting officers, and before produced in evidence by the plaintiffs, show, as they contend, that certain of the credits claimed in the defendant's accounts current, amounting in the whole to a greater sum than the said balance, were suspended by the proper accounting officers, on the coming in of the said accounts current containing them, and were subsequently disallowed; thereby rebutting any presumption that such credits were ever assented to by any officer authorized to act for the plaintiffs; and showing affirmatively that no such assent was given.

The COURT (THRUSTON, J., doubting,) gave the instruction thus prayed by the defendant.

Mr. Key, for the United States, then took up the first disputed item; being a charge, by the defendant, of \$4,480.13 for commission at five per cent. on money disbursed by the defendant for the Quartermaster's department, and produced the two vouchers which had been presented to the accounting officers of the Treasury, namely, a statement of the amount disbursed, and a claim of the commission, and an indorsement thereon in the handwriting of T. Watkins, then Fourth Auditor of the Treasury, signed T. W., and dated March 2, 1829, saying that he had been verbally directed, by the then Secretary of the Navy, to allow the claim, it being for extra official service. The amount of the disbursement was proved by Mr. Gillis, one of the accounting officers. Mr. Kendall, who succeeded Mr. Watkins as Fourth Auditor, testified that he referred the claim to Mr. Branch, the Secretary of the Navy, about the 21st of March, 1829, who rejected it; and that he did not know that any commission of five per cent. had

been allowed in a like case, and could find no precedent for it in the proceedings of the department.

The United States rested their case here ; and

Mr. Coxe, for the defendant, prayed the Court to instruct the jury, and the COURT (*nem. con.*) after argument, did instruct them, that the evidence so adduced by the plaintiffs is not sufficient to rebut the *primâ facie* evidence that the defendant is entitled to his credit for the item of \$4,480.13.

THRUSTON, J., was understood to be of opinion that the indorsement of T. Watkins, then Fourth Auditor, upon the defendant's vouchers, produced in evidence by the United States, was evidence of the allowance by Mr. Southard, then Secretary of the Navy, and that it was the final action of the proper officer upon the subject, and that it could not be revoked by Mr. Branch, his successor.

CRANCH, C. J., was of opinion that the indorsement so produced by the United States was evidence that the claim had been allowed by Mr. Southard, then Secretary of the Navy ; but he was also of opinion that the allowance was liable to be revoked by his successor before the item had been actually carried to the defendant's credit in account by the proper accounting officer ; and that it had been so revoked ; but that the mere rejection of the claim by the government is not sufficient to rebut the *primâ facie* evidence of the defendant's own account produced in evidence by the United States. Nor was that rejection, together with the other evidence given by the United States, sufficient for that purpose.

The Attorney-General, having, without objection, read Mr. Southard's deposition, made the following prayer to the Court.

"The deposition of Samuel L. Southard having been read in evidence, the counsel of the plaintiffs insisted that the same conduced to prove that the said S. L. Southard, as Secretary of the Navy, had never, in point of fact, instructed the Fourth Auditor, T. Watkins, to allow the defendant the additional compensation charged in the aforesaid vouchers, Nos. 219 and 220, as stated in the memorandums indorsed on the said vouchers, but had only authorized him to make such allowance as he, the said Fourth Auditor, should find, on examination, to have been allowed in similar cases ; and that, if the jury should believe the deposition of the said S. L. Southard, to give the correct version of his direction to the said Fourth Auditor, it would be their duty to consider the charges for commissions contained in said vouchers, as open to inquiry, and, upon all the evidence applicable thereto, to make such allowance only as they should find had been made in similar cases ; and prayed the Court so to instruct the jury."

Mr. Coxe, for the defendant, then prayed the Court to instruct the jury, "that it is incumbent upon the plaintiffs, in order to rebut the said *primâ facie* evidence, in addition to the fact that the item of claim, in question, never had been allowed by a secretary of the navy, to show, to the satisfaction of the jury, that the said claim was one which he ought not to allow; and was not authorized, under the usage which has been proved before the jury, to allow."

The counsel of the United States, after the examination of *Mr. Southard*, here in court, varied their prayer thus :

"The deposition of *S. L. Southard* having been read, and his testimony, as above stated, having been given to the jury, the United States prayed the Court to instruct the jury, that, if they should believe, from the evidence, that the said *S. L. Southard*, as Secretary of the Navy, had never, in point of fact, instructed the Fourth Auditor, *T. Watkins*, to allow the defendant the specific compensation of 5 per cent. charged in the aforesaid vouchers, Nos. 219, 220, but had only directed him to make such allowance as he, the said Fourth Auditor, should, on examination, find to have been allowed in similar cases, it would then be their duty to consider the charges for commissions, contained in said vouchers, as open to inquiry; and, upon all the evidence applicable thereto, to make such allowance only as they should find had been usually made in similar cases; or, if it should appear that no such allowance had ever been made in any similar case, then such as they should deem reasonable and just, under all the circumstances of the case."

The COURT, (*nem. con.*) but *MORSELL, J.*, doubting, gave this last instruction, as prayed;

And also gave the above instruction prayed by *Mr. Coxe*, excepting the last clause in these words, "and was not authorized, under the usage which has been proved before the jury, to allow."

Mr. Coxe then prayed the Court to append to the instruction last given, at the prayer of the United States, the following instruction, namely: "But, if the jury shall believe, from the said evidence, that *Mr. Southard*, as Secretary of the Navy, did direct the Fourth Auditor to allow the said claim, specifically, to the extent of 5 per cent. on the amount of said disbursements, as claimed in said vouchers; or, having decided that the said defendant was entitled to an allowance for said services, and that the commission of 5 per cent. was a proper and adequate compensation for such services; and referred to the auditor to examine whether said allowance was in conformity with precedents in other cases, for like extra official disbursements by officers belonging to, or attached to, the navy, by the direction or sanction

of the secretary ; and if the jury shall further find, from the said evidence, that, for similar disbursements of an official character, settled in the said auditor's office, sanctioned and allowed by the secretary, the commission of 5 per cent. had been allowed, that then the said auditor was authorized to make such allowance, and to make such indorsements as appear on the said vouchers ; and that such indorsement amounted, in law, to an actual allowance by the secretary himself."

Which instruction the COURT gave, (THRUSTON, J., dissenting.)

Mr. Coxe then prayed the Court to instruct the jury, that, if they should believe, from the aforesaid evidence, that the said S. L. Southard did authorize and direct the allowance of the claim stated in said vouchers, Nos. 219 and 220, and that the accounting officers omitted to pass such items, upon such allowance, without any default of the defendant, then the said defendant is entitled to the allowance, unless, in making such allowance, the plaintiffs shall satisfy the jury that the said secretary was induced to make it, by fraud, imposition, or misapprehension of the facts of the case.

Which instruction the COURT gave, (CRANCH, C. J., dissenting,) because he thought the act of Mr. Southard was revocable by his successor ; and was revoked by his successor before the credit had been given in any statement of the account by the accounting officers of the department, and before the credit was given upon the books of the department ; and that the United States, therefore, were not bound by the act of Mr. Southard, which was thus revocable by himself or by his successor ; and was so revoked.

Mr. Key, for the United States, then prayed the Court to instruct the jury, that, if they believed, from the evidence, that Mr. Southard, the Secretary of the Navy, by his instructions to the Fourth Auditor, did not designate any specific commission to be allowed to the defendant for the disbursement stated in said vouchers, but left it to the Fourth Auditor to examine the cases of such allowances, and to allow to the defendant such commission as had been allowed to other officers for such disbursements, then such authority could be lawfully given to the said Fourth Auditor, and his indorsement on said vouchers is not binding on the United States.

Which instruction the COURT refused to give, (THRUSTON, J., dissenting.)

The next class of charges, in the defendant's account, consisted of claims for compensation, as Paymaster of the Marine Corps.

Mr. Key, for the United States, contended that the only law under which the defendant could claim compensation was the Act of Congress of the 16th of April, 1814. [3 Stat. at Large, 124.]

Mr. Coxe, for the defendant, contended that the defendant was entitled to the pay and emoluments of a major of cavalry, or a major of the general staff, under the acts of the 16th of May, 1812, [2 Stat. at Large, 735,] and the 24th of April, 1816; the same having been allowed to Mr. Satterlee Clark, a district paymaster in the army of the United States, by the verdict of a jury, and the judgment of the Circuit Court of the United States for the Eastern district of New York, in the year 1827. Upon the authority of that case Mr. Southard allowed the same compensation to the defendant, as appears by the voucher No. 215, with Mr. Watkins's indorsement thereupon.

The officers of the marine corps, not being satisfied with the compensation allowed by the Act of April 16, 1814, Congress, by a joint resolution, on the 29th of May, 1830, continued the old rates of compensation till the 28th of February, 1831, and made a special appropriation for the extra emoluments. (See also the Act of 2d March, 1831, c. 57, [4 Stat. at Large, 460,] and the Resolution of 25th May, 1832, [Ib. 605]; Congress Document, No. 107, 28th May, 1829; the Auditor's Report, printed by order of the House of Representatives, 1830, pp. 6 and 7; Navy Rules in 1832, p. 40, c. 45; Document 121, p. 7; the 4th Auditor's Report.)

Mr. Attorney-General referred to Document 121, p. 1; Letter from the Secretary of the Navy of 29th May, 1830; Report of the 4th Auditor; and Statement D. and the Remarks in p. 7. Mr. Kendall testified that the defendant had never received more than the pay and emoluments of a major in the infantry, and never claimed more until the decision in the case of Satterlee Clark.

Mr. Coxe, for the defendant, then prayed the Court to instruct the jury "that if they should believe the evidence aforesaid, the defendant is entitled to the several credits claimed in the vouchers Nos. 332 and 333," namely, the pay and emoluments of a major in the cavalry.

Which instruction the Court (MORSELL, J., doubting,) refused to give.

CRANCH, C. J. The defendant, as paymaster of the marine corps, claims, in his account with the United States, a credit for the pay, subsistence, emoluments, and allowances of a major in the general staff of the army, from the 20th of November, 1821, to the 8th of October, 1830, when he ceased to be paymaster.

Up to the 1st of January, 1828, he received credit in his accounts for the pay and emoluments of a major in the infantry.

In the year 1827, Mr. Satterlee Clark, who had been a District Paymaster in the army of the United States, in a suit brought by the United States against him in the Eastern District of New York, obtained, by the verdict of the jury and judgment of the

court, credit for the pay and emoluments of a major in the general staff.

The present defendant then exhibited a like claim against the United States ; and on the 2d of March, 1829, Mr. Southard, then Secretary of the Navy, verbally instructed the then 4th Auditor, Mr. Watkins, to allow it, on the ground that the paymaster of marines was entitled to the pay of a district paymaster, which, in Clark's case, was decided to be that of a major of the general staff, as appears by the indorsement of Mr. Watkins upon the voucher No. 215.

Nothing further appears to have been done until a change had taken place in the offices of the Secretary of the Navy and 4th Auditor, when the claim was rejected, the new secretary and auditor being of opinion that the defendant was only entitled to the pay and emoluments specially provided for in the Act of Congress of the 16th of April, 1814, [3 Stat. at Large, 124,] by which the adjutant, paymaster, and quarter-master of the marine corps, were to "receive thirty dollars per month in addition to their pay in the line, in full of all emoluments."

This decision of the new secretary and auditor having been made a subject of complaint to Congress by the officers of the marine corps, a joint resolution was passed on the 29th of May, 1830, "That the pay, subsistence, emoluments, and allowances, received by the officers of the marine corps previous to the 1st of April, 1829, be, and the same is hereby directed to be continued to them from that date up to the twenty-eighth day of February, one thousand eight hundred and thirty-one." [4 Stat. at Large, 430.]

This resolution confirms and continues the allowances that had been received by the officers of the marine corps previous to the 1st of April, 1829 ; and comprehends the whole period of the defendant's accounts. It seems, therefore, unnecessary to inquire whether the decision of the new secretary and auditor was or was not correct ; and the only question which can arise, is a question of fact, to wit, what were the pay, subsistence, emoluments, and allowances received by the officers of the marine corps, previous to the 1st of April, 1829, so far as regards the paymaster. Up to the year 1828, he had received the pay, &c. of a major in the infantry ; and no paymaster of the marines had, on the 1st of April, 1829, received more. On that day the defendant had never received the pay, subsistence, emoluments, or allowances of a major of the general staff ; nor does it appear that any paymaster of the army had ever received such pay, &c., except Mr. Clark, whose case had been judicially decided. The practice of the department had not been changed by the decision of that case. The words in the resolution, "allowances received," must mean,

sums of money allowed and paid to the officers, or passed to their credit in account. The order of Mr. Southard, then Secretary of the Navy, to the then 4th Auditor, to allow the defendant's claim, was not, as it seems to me, an allowance received by the defendant, within the meaning of the resolution; nor does it appear that that order was known to Congress when the resolution was passed. That resolution received the signature of the President on the 29th of March, 1830.

It does not appear what documents were before Congress in relation to the pay, &c. of the officers of the marine corps previous to the 1st of April, 1829.

The letter of the 4th Auditor to the Secretary of the Navy of the 28th of May, 1829, (Document No. 107,) was not ordered to be printed by the House of Representatives till the 25th of May, 1830; and the letter of the 4th Auditor of the 28th of May, 1830, (Document, No. 121,) was not read and laid on the table till the 29th of May, 1830, the very day on which the joint resolution was approved by the President; so that it is not probable that either of those documents was the foundation of the resolution, and, therefore, cannot be considered as having any bearing upon the construction which ought to be given to that resolution. They may, however, in connection with the testimony of Mr. Kendall, be considered as evidence to show what was the pay, &c., received by the officers of the marine corps previous to the 1st of April, 1829.

If no paymaster of the marine corps had, previous to that day, received the pay, subsistence, emoluments, and allowances of a major of the general staff of the army, it seems to me very clear that the defendant is not entitled to claim them under that resolution; and even if the Court should be of opinion that he would have had a right to claim them if that resolution had not been passed, although he had not received them before that day, I doubt whether he could, after that resolution, claim more than the pay, &c. which he had received previous to that day. The joint resolution does not profess to affirm that the allowances, previously received, were at the time, authorized by law; but to sanction what had been done, and to continue the same pay, &c. for a limited time.

If, therefore, the jury should be satisfied by the evidence, that the pay, subsistence, emoluments, and allowances, received by the defendant as paymaster of the marine corps, previous to the first of April, 1829, were those of a major in the infantry, I should instruct the jury that the defendant is only entitled to claim the same pay, &c.; and is not entitled to claim the pay, &c. of a major of the general staff.

It has been suggested that the estimates upon which the appro-

priations for the marine corps for the years 1831, 1832, and 1833, were based, state the pay of the paymaster at \$60 a month, and four rations ; and that that statement sanctions the defendant's claim.

I doubt, however, whether, when a salary is fixed by a law such as that of the 16th of April, 1814, a simple appropriation, based upon an estimate in which a higher salary is stated, can be considered as repealing the law which fixed the salary. Suppose an officer's pay to be fixed, by the law which creates the office, at \$1,000, and an appropriation for the civil list should be made, founded upon an estimate in which the salary should be stated at \$2,000, would the officer be entitled to receive the \$2,000 ? Or, suppose the estimate should state it to be only \$500, would he not be still entitled to the other \$500 ? But, however that may be, the estimates referred to, are all subsequent to the time for which the defendant claims, and, therefore, cannot affect the case. It may be observed, also, that those estimates are made by the paymaster himself, who would, of course, make them conformable to the law as he understood it ; and as there was a claim for \$60 a month, it was, perhaps, proper to state enough to cover it.

I cannot, therefore, agree to give the instruction prayed by the defendant's counsel.

THRUSTON, J. By the admission of the counsel of the United States, and of the defendant, the only question, now left for the Court to decide, is, what were the pay and emoluments of the paymaster of the marine corps, previous and up to the 1st of April, 1829 ; or rather, was he then entitled to those of a major of cavalry, or of a major in the infantry ? It seems to be admitted by the counsel for the United States, that, by the resolution of Congress of the 29th of May, 1830, which reversed the construction of the Fourth Auditor, who restricted the pay and emoluments of the paymaster to the limits of the Act of the 16th of April, 1814, [3 Stat. at Large, 124,] inasmuch as the pay and emoluments of the paymaster had, previous to such decision of the Fourth Auditor, been allowed in the Navy Department as those of a major of infantry, and credit given on the books of the department therefor, that such allowance cannot now be questioned ; but they deny that, in addition to the pay and emoluments of a major in the infantry, the defendant is entitled to those of a major of cavalry, which addition constitutes the difference between the parties now to be adjusted by this Court and jury. It becomes the duty of the Court carefully to examine the Acts of Congress, to see how far the claim of additional compensation can be sustained.

Although, by the decision of the Supreme Court, and the admission of the counsel of the United States, the allowance of the pay and emolument as a major of infantry as settled and credited

on the books of the Navy Department, is no longer open to examination by this Court, not because such allowance was sanctioned by the laws, but because it had been actually made and credited to the defendant on the books of the Navy Department, yet we have the power, and it is our duty to determine how far the accounting officers of the Navy Department were warranted, previous to the resolution of Congress of the 29th of May, 1830, by the then existing enactments of Congress on this subject, to have made such allowance; and should this Court be of opinion that they ought not to have exceeded the rate prescribed by the Act of the 16th of April, 1814, [3 Stat. at Large, 124,] then the matter now in dispute is settled, and the claim of the defendant for further compensation than what has been allowed, must be overruled.

The statute of the 16th of April, 1814, is certainly too clear to admit of any doubt in its construction; it applies specially to the marine corps; admits of no latitude of construction, and fixes the pay of paymasters of the marine corps.

The question then arises, has this statute been directly or impliedly repealed by any subsequent statute? It has been attempted, on the part of the defendant, to show that the compensation, provided by the Act of the 24th of April, 1816, [3 Stat. at Large, 297,] of paymasters of the army was applicable to, and ought to be extended to paymasters of the marine corps; and that this compensation was equivalent to the pay and emoluments of a major of cavalry. We will first examine the prior branch of this proposition, namely, that the paymasters of the marine corps are, by reasonable construction of this statute, embraced in the enactment which fixes the compensation of paymasters of the army; if so, the statute of the 16th of April, 1814, must be virtually repealed, not expressly, but by necessary inference or implication; and in support of this construction it was contended, that the marine corps is part of the army in fact; that when required to do service on land, they are so to all intents and purposes; that they are subject to the rules and articles of war, and that various statutes recognize this identity in regard to general provisions, where there is no special declaration or indication of any intention to discriminate between them; that the defendant was compelled to give bond as paymaster of the marine corps, pursuant to the requisition of the 6th section of the said Act of the 24th of April, 1816, [3 Stat. at Large, 297]; that the law had always received this construction by the accounting officers of the Navy Department, since the defendant received the appointment of paymaster, &c., and other arguments of equal weight and importance. With a view to estimate the value of these arguments,

I have examined the several acts on this subject, as far as time would permit, and will state the result of my investigations.

In the first place the Act of the 1st of July, 1797, "providing a naval armanent" [1 Stat. at Large, 523,] assigns to each ship, besides mariners, &c., a certain number of marines. The duty of the marines is exclusively maritime; for sea service only. By this act they have no connection with the army, in character or duty to be performed. Here they are not amphibious.

The next act on the subject of the marine corps is that "for establishing and organizing a marine corps," of the 11th of July, 1798, [1 Stat. at Large, 594.] From the first enacting clause an argument has been drawn from the words "in addition to the present military establishment, there shall be raised a corps of marines," &c., that marines became, in fact, a part of the military establishment; or, at any rate they established such a harmony, and blending of the two corps, that certain general provisions relating to one, (that is, the army,) embraced the other, and that this consentaneousness or harmony was materially strengthened and confirmed by the last section, authorizing the President to employ the marines on shore, &c., (see section 4.) But it is a most violent interpretation, it seems to me, to consider the words, "in addition to the present military establishment," as having any force in identifying the two corps in character or circumstance. The marines were a body known to the law by the Act of July 1st, 1797, as a purely maritime or naval force; and the enlargement of that force, or assigning to them duties on shore, does not necessarily identify them with the army, and those words could not have the effect of constituting a force, governed by different rules and regulations, and destined to a service unknown to, and incompatible with, the character and duties and services of the army, a part of that army. The marines are certainly a military force, as well as the army, and are in addition to the then existing military establishment. It is to be remarked, also, that although the marines may be compelled to do duty on shore, it is no part of their ordinary duty, but at the discretion of the President, as in case of the invasion of the territories of an enemy's coast, by a naval force the seamen may be compelled to do the duty of soldiers or marines, at the discretion of the commander of the ship or squadron. But, whatever inferences might be drawn from these expressions, the Act of the 16th of April, 1814, annihilates them, because it legislates on the very matter in question, and makes a special provision for paymasters of the marine corps which admits of no sort of doubt. It professes to embrace the marine corps only. Here all former doubts, all inferences and constructions are done away. The compensation of the pay-

master of the marine corps is fixed so clearly, that, but for the joint resolution of Congress of the 29th of May, 1830, it must be now in full force, unless it has been repealed by some subsequent statute directly or expressly, or by some strong and necessary implication; for I take it for a certain and established rule of construction, that a statute distinctly and clearly expressing the intention and meaning of the legislature on any particular point, cannot be repealed unless by a subsequent statute equally clear and distinct, or by necessary implication or inference with which the previous statute cannot be reconciled; but a subsequent statute legislating upon a different subject, and where there is such an incongruity between the objects of legislation, as that of the army and marine corps, where, if there be any harmony or identity it is in certain points only, one of which is that they are both military establishments; and another, much relied on, is, that the marines may (not by the direction of law, but by the will of the President, at his discretion, and which, therefore might have never been invested with this feature of congruity or identity,) be compelled to serve on shore; for from this provision, that the President may order them to do duty on shore, is the strongest argument drawn that they became identified with the army. But unless the President does order them to do duty on shore, the analogy, or identity is done away; then it depends on the exercise of the President's will whether the ground of identity is to vest or not. If he does not order the marines to serve on shore, then they are no longer of doubtful character; no amphibious men, but purely of a maritime character, distinct from the army essentially in numerous particulars, set out more at large by the Fourth Auditor in his report of and on which, as they are known to the counsel on both sides I make no remarks, except that I thought they had much weight. I do not see much more reason to consider the character of marines transformed into that of soldiers by their liability occasionally to serve on shore, than that seamen compelled sometimes to serve on land with marines should be transformed into that of marines. We find distinct statutes concerning the army and marine corps. The pay of the officers of the marine corps is fixed by statutes confined to the marine corps only; of the army, by statutes relating to the army only. In fact, I have seen no act professing any thing like general legislation in the same act over both branches of our national defence, except in some special provision, where it is clear that Congress meant to extend them to both bodies. There are numerous statutes relating to the army, particularly during the last war, and comparatively few relating to the marine corps; and to consider such general expressions as the words, "in addition to the mili-

tary establishment," or the provisions of the "liability of the marines to serve on shore at the will of the President," as so identifying the two corps, as that the provision for the compensation of the paymaster of the army should extend to the paymaster of the marine corps also, and thereby repealing the previous statute of April 16th, 1814, especially fixing the compensation of the paymaster of the marine corps, is extending the license of construction further than I have known; for such, if I understood, is the argument; for, having in the manner I have stated, fixed, as the defendant's counsel supposed, the analogy, congruity, or harmony, and, indeed, identity, or whatever it is, between the army and marine corps, he then comes to the Act of the 24th of April, 1816, "for organizing the general staff, and making further provision for the army of the United States." Army, observe; not "the military establishment;" army proper, as appears evident from its general enactments; and it is the third section of this act which fixes the pay of the paymaster of the army under which the defendant has thought himself justified in claiming his pay as paymaster of the marine corps, as growing out of and sanctioned by this third section; that the said section included the paymaster of the marine corps.

Now it does seem to me, that, as well from the title which exposes the object of the statute, as all the enactments throughout, there is no ground for extending any of its general provisions to the marine corps. It would be too tedious to enumerate the multiplied evidences of this; but we will take up the most material section, the third, which legislates on the very matter in hand, to wit, the compensation of paymasters. They are to receive the pay and emoluments of major, and therefore the defendant is entitled to the pay and emoluments of major; and this section repeals the special statute of 1814. Now is it not evident, to say nothing of other objections, that this section cannot be construed to have embraced paymasters of the marine corps, because it is provided in the 4th section that regimental and battalion paymasters shall make correct reports to the paymaster-general once in two months, on pain of being dismissed? Now the paymaster of the marine corps does not make his reports to the paymaster-general, nor is he under his jurisdiction; but his reports, if he ever makes any, and his accounts are settled to and with the Navy Department.

The compensation here, then, was intended exclusively for such paymasters as were accountable to the paymaster-general; that is, paymasters of the army proper; and such a construction seems warranted by the whole context throughout. But it seems the defendant gave the bond required by the 6th section. How

far the Secretary was right in demanding it, is not material. The generality of the expression, "all officers of the pay department," &c., might seem to justify such an exaction from the defendant; but if it did, it may grow out of the universality of the import of the word "all;" but in my conception, the provision is coextensive only with the provisions of the act, and relates to paymasters only of the army proper. But it is immaterial whether the secretary acted right or wrong in requiring an official bond from the defendant as paymaster of the marine corps; his construction of the act does not bind us, more than it binds the defendant, who is now asking this Court to reverse the judgment of the Secretary on the construction of the very act, when he is at the same time invoking that same judgment in aid of the construction he urges before this Court.

Again, the case in New York, *The United States v. Clark*, has been cited, where, by the verdict of a jury, the pay of a major of cavalry was allowed to the defendant, who was a district paymaster of the army. We have not the record before us, and therefore cannot be certain that the judge settled any point of law in the case. If he had so settled the amount of pay, I confess, without having his reasons before me, I am utterly at a loss to imagine on what grounds he so decided. Why he should, if he did so, take the pay of a major of cavalry as the measure of compensation for a paymaster, when the law expressly fixes it by the pay of a major of infantry, I am unable to discern.

This decision of the New York judge, (if he gave such an opinion,) is said to be balanced or neutralized by the opinion of Judge Peck, in Missouri; and, as the case is now before the Supreme Court, the matter is likely soon to be settled, and will, I suppose, be the rule by which the accounting officers of the Navy Department will adjust the claim of the defendant, should it also be settled that the paymaster of the marine corps is entitled to the same compensation as an army paymaster; which, however, for the reasons I have already given, does not appear to me to be the case.

It was contended, also, by the defendant's counsel, that the joint resolution of Congress, of the 23th (29th) of May, 1830, which impliedly sanctioned the allowance which had been made, of the pay of major of infantry, to the defendant, by directing such pay and emoluments as had been, before that time, received by the officers of the marine corps, to be allowed to them thereafter, (for a limited period, but by a subsequent resolution extended indefinitely,) ought not to be restricted to such compensation as had been actually received, but should be extended to such compensation as ought to have been received, and that such

compensation ought to be that of a major of cavalry. But the wording of the resolution will not admit of such construction. Congress knew, from the reports of the Secretary and Fourth Auditor, what had been received, and what was claimed, and they limit the amount to what had been received, and did not extend it to the amount claimed, so that there is nothing in these resolutions showing any design in Congress to extend the compensation further than the plain sense of the words of the resolutions import. But if those words could afford any inference that Congress meant to give their approbation to such compensation as ought, by law, to have been allowed, and not to such "as had been received," still the question is open for this Court to say what ought to have been allowed. No aid, therefore, in support of the claim, can be derived from these resolutions, but the reverse; and as far as those resolutions can be considered as any declaration of the legislature as to the meaning of the several statutory provisions, in regard to the defendant's compensation, they go to sanction what was already done, and to repel the additional compensation now claimed. They have granted a boon, not a right founded on preceding laws; though their grant may be based on equitable principles. It was a case where there was no reason to make a distinction between officers of the same rank, and with equal and similar duties, but which the legislature had not provided for, and which defect we could not supply; and were the accounts of the defendant not closed at the Navy Department, and those resolutions of Congress, out of the way, and I was reduced to the necessity of now saying what compensation the law allowed to the paymaster of the marine corps, I should be compelled to say that I have seen no subsequent act of Congress, which, without a most strained and unreasonable construction, repealed that of the 16th of April, 1814, and that, consequently, that act afforded the true and only rule by which such compensation should be settled.

I have thus, as far as my memory served me, noticed all such material points as appear to me to have been urged by the defendant's counsel, and written, very hastily, to be sure, from the shortness of time, such remarks as the very imperfect consideration of the statutes on the subject suggested to me. I must conclude, as the result of my consideration of the case, that I cannot give the instruction prayed for by the defendant's counsel. But, as this is a case different from that decided in the Court of Missouri, by Judge Peck, which involved the pay and emoluments of a paymaster of the army proper, in which, I understand, there is an appeal to the Supreme Court; and, as the decision of the Supreme Court, in that case, may not settle the disputed points

in this; and, as the claim of the defendant involves a sum of consequence, in which an appeal will lie, I should be gratified if the matter could be so arranged as to make the United States appellants, as they possess faculties and facilities for prosecuting an appeal, for want of which the defendant might be unable to prosecute his appeal, and so lose the benefit of a revision of our judgment, by that tribunal.

Mr. Coxe, for the defendant, then prayed the Court to instruct the jury, that the Act of the 16th of April, 1814, [3 Stat. at Large, 124,] does not preclude the defendant from the allowance claimed.

Which instruction the COURT (MORSELL, J., doubting,) refused to give, being of opinion that the second section of that act has not been repealed or altered, so far as regards this case, except so far as it is repealed or altered by the resolution of the 29th of May, 1830; and that there is no evidence, before the jury, to show that the pay, subsistence, emoluments, and allowances claimed by the defendant, in the said items, No. had been received by any paymaster of marines previous to the 1st of April, 1829.

The United States, having given notice to the defendant to produce his books of accounts kept by him, as paymaster, the COURT (*nem. con.*) said that these were to be considered public books, so far as to authorize the United States to use them in evidence.

Mr. Coxe, for the defendant, then prayed the Court to instruct the jury, that it was not competent for the Fourth Auditor, in 1829, to direct a recharge against the defendant, of the item of \$7,564.13, which had been passed to his credit, in the treasury account, settled in 1823. Or, if the Court should refuse that instruction, that they would instruct the jury, that, before the defendant shall be precluded from the benefit of such credit, in the said account of 1823, the jury must be satisfied, beyond any reasonable doubt, that such original credit was allowed by the proper accounting officers who settled the same, by fraud, imposition, or mistake.

The COURT (*nem. con.*) refused the first part of the instruction, and granted the second; and CRANCH, C. J., delivered the following opinion:

In the settlement of the defendant's account, No. 3961, with the United States, in April, 1823, he was credited "by R. M. Desha," his predecessor, the late paymaster, "for amount paid Captain Samuel Miller, \$7,564.13."

The voucher for this item consists of a receipt, in these words: "Received vouchers from Major Miller, amounting to seven

thousand one hundred and eleven dollars and thirteen cents, which vouchers were acquired during my visit to the western country, and which were paid by him. Washington, 31st January, 1820. R. M. Desha, P. M. M. C." "Admitted, C. F."

Upon which was the following indorsement :

"The amount of the within receipt has not been placed to the credit of Major Miller, on the books of R. M. Desha." "Joseph L. Kuhn, P. M. M. C."

And of two receipts given by Major Miller, to Mr. Desha, for amount of his services as acting quarter-master of marines, in behalf of Colonel Grayson, amounting to \$453; upon which receipts were similar indorsements that the amount thereof had not been placed to the credit of Major Miller, on the books of Mr. Desha.

The defendant was the successor of Mr. Desha, as paymaster of marines; and sundry balances due by officers of marines, on Mr. Desha's books, for advances made by him to them, were transferred from his books to those of the defendant, for collection, or stoppage out of their future pay and emoluments; a list of which balances the defendant had sent to the Fourth Auditor, on the 19th of November, 1822. Mr. Desha, when he went out of office, was largely indebted to the United States; and there seems to be evidence tending to show an understanding, at least, between Mr. Desha, the accounting officers of the United States, and the defendant, that, when the defendant should receive those balances, they should be passed to his debit, and to the credit of Mr. Desha, upon the books of the United States.

Among the balances, thus transferred, was one of \$12,481.74, against Major Miller, to whose credit the \$7,564.13 ought to have been entered upon the books of Mr. Desha, and, if they had been so entered, the balance of Major Miller's account, transferred from Mr. Desha to the defendant, would have been so much less, namely, \$4,917.61, instead of \$12,481.74. The sum of \$7,564.13, if the proper vouchers had been produced, should have been placed by the proper accounting officers of the United States to the credit of Mr. Desha, to whose debit the money was placed, out of which it was paid; and the accounting officers of the United States could not be justified in passing that sum of \$7,564.13 to the credit of the defendant, unless they should, at the same time, charge him with the balance, \$12,481.74, appearing against Major Miller on Mr. Desha's books, and transferred from them to the books of the defendant. And, it seems, from a memorandum made in the dissecting book, by Mr. McDaniel, late accounting clerk in the Fourth Auditor's office, that he supposed it was to be passed to the debit of the defendant

and to the credit of Mr. Desha, "as so much of the balances on Desha's books, transferred to the defendant." The memorandum is in these words: "Kuhn, ch. to Desha for these sums," (\$7,111 and \$453,) "as so much of the balances on Desha's books, transferred to Kuhn."

In the same settlement of the account No. 3961, the defendant is debited \$22,218.53, "to R. M. Desha for stoppages on account of balances transferred on paymaster's books." The voucher for this charge was a letter from the defendant to the 4th Auditor, directing him to charge him and credit Desha for that amount.

It is evident, however, that this item did not include the sum of \$7,564.13, which was not a stoppage, with which the defendant would charge himself, as he had received nothing for it. When, therefore, it was entered to the credit of the defendant in the account No. 3961, it stood alone without any corresponding debit, and was a palpable error; and if it was not corrected in any intermediate settlement, the debit in the settlement (new series, No. 1133,) of the 9th of June, 1830, is correct, in these words: "for this sum improperly debited to Desha, and credited to J. L. Kuhn, in the settlement of his account No. 3961, reported May 1, 1823, \$7,564.13."

The subsequent statement, charging the defendant with \$60,-667.92 for balances transferred, and deducting therefrom the several items there stated, does not alter the case as to the item of \$7,564.-13; for that statement is only a transcript of the defendant's own account as stated with Mr. Desha, excepting the following items, which constitute the balance of \$3,455.44.

Overcharge to Captain Gamble,	\$350.00
" to Thomas A. Linton,	220.00
Commission, at 5 per cent. on \$33,835.34,	1,691.76
Balance due Desha by Col. Wainwright,	1,093.68
And an error in adding up the balances,	100.00
	\$3,455.44

In that statement the sum of \$7,564.13 is very properly deducted from the list of balances.

The Court, therefore, refuses to give the instruction prayed by *Mr. Coxe*, for the defendant, "that it was not competent for the 4th Auditor, in 1829, to direct a recharge against the defendant of the item of \$7,564.13, which had been passed to his credit in the Treasury account settled in 1823."

MORSELL, J., concurred.

THRUSTON, J., gave no opinion.

Mr. Key, for the United States, having concluded his opening argument to the jury upon the evidence, prayed the Court to in-

struct the jury, "That the papers offered in evidence by the plaintiffs and defendant, in reference to the item of \$7,564.13 do show, in the opinion of the Court, that the credit given to the defendant at the office of the 4th Auditor, for that sum in the settlement of 1823, was erroneously given."

But the COURT (THRUSTON, J., absent,) refused to give the instruction; because the written evidence was connected with a great deal of parol evidence, and the question, whether the credit was "erroneously" given, was a question of fact to be decided by the jury from the whole evidence, written as well as parol.

The COURT (MORSELL, J., absent,) at the prayer of *Mr. Key*, for the United States, instructed the jury that the act of 1814 gives the paymaster of the marine corps, a certain sum, in lieu of all emoluments; that that law was in force from 1821 to 1829; and that the defendant ought not to be allowed the pay, &c. of a major of cavalry under the said act; and that the defendant, upon the evidence aforesaid, (meaning the whole-evidence,) is not entitled to claim any allowance, in this suit, for the pay, &c. of a major of cavalry.

Verdict for the United States, \$10,373.03.

The defendant died soon after the verdict, and no writ of error was prosecuted.

CIRCUIT COURT OF THE UNITED STATES.

MARCH TERM, 1834, AT WASHINGTON.

UNITED STATES *v.* SALLY McDOWELL.

Upon an indictment for keeping a house of ill fame, evidence may be given of the ill fame of its inhabitants, but the witness will not be required to disclose their names. The attorney of the United States will not be permitted to prove that his own witness is a woman of ill fame.

INDICTMENT for keeping a bawdy-house.

Mahala Tennison, a witness for the United States, had stated that she had lived in the house, and was asked what other women lived there.

Mr. W. L. Brent, the defendant's counsel, objected to the question, and cited *Hodgkins's case*, Russel, 619.

The COURT (*nem. con.*) overruled the objection, but refused (CRANCH, C. J., doubting,) to require the witness to disclose the names of the women; because the persons, if named, would have no means of repelling the infamy which it would cast upon them.

Mr. Key, for the United States, then called a witness to prove that his witness, Mahala Tennison, was a woman of ill fame.

Mr. Brent, for the defendant, objected, and

The COURT (*nem. con.*) sustained the objection.

Verdict, not guilty.

JOHN FLEMING, Appellant, *v.* MORDECAI FOY, Appellee.

A wager may be recovered at common law, although the parties have no other interest in the subject of the wager, than that which is created by the wager itself.

APPEAL from the judgment of a justice of the peace, for \$20 and costs against Fleming, founded upon the following writing:

"September 24th, 1832. I agree to pay to Mr. M. Foy \$20 if your colour man did not execute my thre springs of my car-
rage all to gether moening the four springs. JOHN FLEMING.

"Mr. A. Russell."

CRANCH, C. J., delivered the opinion of the Court, (THRUSTON, J., absent, but assenting.)

This is understood to be a wager, and that a correspondent writing was given by M. Foy, and that the two promises were mutual considerations to each other.

Mr. Morfit, for the defendant, (the appellant,) contends, that no wager can be recovered at common law, and cites the following cases, to wit :

Smith v. Ary, 3 Salk. 175, in which the Court held that *indebitatus assumpsit* would not lie upon mutual promises, because debt would not lie. But no objection was made upon the ground that the wager was unlawful; or that it was a gaming transaction, although it was for money won at play. The case turned entirely upon the form of action; it is, therefore, rather against the point for which it is cited.

Eggleton v. Lewin, 3 Salk. 176, (2 Annæ.) *Indebitatus assumpsit* for £20, won at cards. Upon a writ of error, "the error assigned was, that a *general indebitatus assumpsit* would not lie for money won at play; and the greater number of judges inclined that it would; but Holt, C. J., and Pollexfen, C. J. of C. B., that it would not, because there must be some meritorious act as a consideration to maintain such action; it will lie against him who holds the wager, because the law implies a promise to deliver the money to the winner." This case also was decided upon the form of the action, and is against the point for which it was cited. It was before the 9th of Anne, and after the 16th of Car. 2, which only prohibited wagers to the value of £100.

Amory v. Gilman, 2 Mass. Rep. 5, was upon a policy of insurance; and the opinion of the Court was, that a policy without interest was void; and the reason is expressed in *Goddart v. Garrett*, 2 Vern. 269, "that these insurances are made for the encouragement of trade; and not that persons unconcerned in trade, nor interested in the ship, should profit by it." The Court expressed no opinion respecting the validity of wagers in general, but confined their remarks to wager policies of insurance. The case, therefore, is not in point.

Good v. Elliot, 3 T. R. 693. This was an action upon a wager that Susannah Tye had, before a certain day, bought a wagon belonging to D. Coleman. After verdict for the plaintiff, there was a motion in arrest of judgment, upon the ground that all wagers are illegal where the party has no other interest in the subject-matter of them than that which he chooses to create by his bet. This case is cited for the opinion of Mr. Justice Buller, which was overruled by the three other judges. Mr. Justice Grose said, "In thus stating the proposition, it seems admitted that some cases are legal; and, indeed, it cannot, after the differ-

ent authorities which have been decided, be doubted ; ” “ and that after the cases which have been determined, to say that this action cannot be maintained, would be to make law and not to interpret it.” Mr. Justice Ashhurst said, “ As to the general ground, namely, whether an action will lie on any wager, that question does not now appear open to argument, it having been settled by so many authorities, both ancient and modern, particularly in the case of *Da Costa v. Jones* ; and Lord Kenyon, C. J., said, “ I have not entertained the least doubt upon this question, from the time it was argued down to the present moment.” “ Now, in order to know what the law has said upon this subject, let us trace it back, and it will be found, that from the earliest times, the books all speak the same language.” And again he says, “ From the earliest times, therefore, down to the case of *Da Costa v. Jones*, there appears to have been no doubt on the subject.”

And in that case, “ Lord Mansfield said, that indifferent wagers upon indifferent matters, without interest to either of the parties, are allowed by the law of this country, so far as they have not been restrained by particular acts of parliament ; and the restraint imposed in particular cases, supports the general rule.” And again, Lord Kenyon says, “ Being bound by former decisions ; not having the power to alter the law ; not finding any one case against the legality of wagers in general ; and finding cases without number, wherein wagers have been held to be good, and that the payment of them may be enforced, I think the wager in the present case good at common law.”

Robinson v. Mearns, 6 Dow. & Ry. 26. This was an action for money had and received, brought to recover back a sum of £20, which had been deposited by the plaintiff in the hands of the defendant as stake-holder upon a wager on the event of a horse-race. After the race, there being a dispute between the parties as to which horse had won, the plaintiff demanded his deposit. After verdict for the plaintiff, leave was given to the defendant to move for a nonsuit ; and one ground taken was, that the wager itself was illegal and void, and no action could be maintained respecting it.

It was admitted that the wager was illegal ; and the verdict was sustained “ on the ground that it ” (the money) “ was demanded before it was paid over, the wager itself being illegal.” But Holroyd, J., said, “ Upon looking into the authorities, it will be found that the right of the party to recover back the deposit paid on a wager, does not depend upon whether the wager be illegal and void, or whether it be won or lost ; but upon whether the stake-holder has received it upon an illegal consideration ; for if he has, he is bound to refund it.”

This case, we suppose, is cited because it admits that a wager of £20, upon a horse-race, is illegal; and the conclusion drawn from it is, that all wagers are, at common law, illegal. But no such conclusion can be drawn, because a wager for more than £10 upon a horse-race, is void by the 9 Anne, c. 14, taken in connection with 16 Car. 2, c. 7, as decided in the cases of *Goodburn v. Marley*, 2 Str. 1159; *Lynal v. Longbotham*, 2 Wils. 36, and *Blaxton v. Pye*, 2 Wils. 309. On the contrary, the statute which makes void the wager, is evidence that it was not void at common law.

But it is said that the earliest case cited in *Good v. Elliot*, was that of *Andrews v. Hearne*, 1 Lev. 33, in the 12th year of Charles 2d, Anno, 1660, and that prior to that time the law was otherwise. But there is no case to the contrary, and Ld. Kenyon says that the law was so from the earliest times. It has also been said, that we took the common law as it existed and had been expounded at the time of the first emigration to Maryland, namely, in the year 1633, the date of the charter, which was twenty-seven years before the case of *Andrews v. Hearne*; so that that case is no authority here. If cases made the law, instead of being merely evidence of the law, this would be true; but a recent case is as good evidence of what the common law, in a like case, was, one hundred years ago, as it is of what the common law now is; and such has been the prevailing opinion in Maryland, whose courts have, up to the present time, considered the decisions of the English courts as evidence of the common law in cases in which it has not been authoritatively adjudged otherwise in the courts of Maryland.

In regard to wagers in general, the cases which have been cited have generally been considered in the United States, as settling the law. This Court has so considered them; and in the case of *Denney v. Elkins*, at May term, 1831, in this Court, [*ante*, 116,] the law respecting wagers in general, was considered as settled; and that case was decided upon that exception to the general rule which condemns wagers against the public policy of the country in regard to the freedom of elections.

The general rule is, that a fair wager may be recovered at law. To this rule there are exceptions, as stated in the case of *Good v. Elliot*, 3 T. R. 693.

The wager in the present case, however, does not come within any of the exceptions.

Judgment affirmed, with costs.

UNITED STATES v. JOHN BROOKS.

The disturbance of public worship is an act tending to destroy the public morals, and to a breach of the peace.

It is a common injury to an indefinite number of persons, neither of whom could sue alone; it is therefore an indictable offence at common law.

THIS was an indictment for disturbing the congregation of the African meeting-house while engaged in the worship of God.

After conviction, the defendant moved in arrest of judgment.

Mr. Dandridge, for the defendant, contended, that if the disturbing of public worship in the established church was a common-law offence, yet the disturbing of a Methodist meeting was not. The holding of such a meeting was in itself a common-law offence. The precedent cited by *Mr. Key*, from 2 Chitty, 23, 29, is only for trespass in breaking the windows of a church. All the indictments for disturbing public worship are upon statutes. Chitty *per se* is no authority.

Mr. Key, *contra*, cited 2 Chitty, Cr. L. 20, 33, &c.; *Sudley's case*, 1 East, Cr. L. 3; *Commonwealth v. Hoxey*, 16 Mass. Rep. 385. (See also 1 Nott & M'Cord, 278; 11 Serg. & Rawle, 394; 5 Bin. 555; 8 Johns. 290.)

CRANCH, C. J., delivered the opinion of the Court:

The indictment charged that negro John Brooks on the 20th of December, 1823, at, &c., "with force and arms unlawfully and irreverently did disturb and hinder the congregation of the African meeting-house in Washington county aforesaid, then and there in the said house assembled for, and engaged in, the worship of God, by cursing and swearing, and loud and profane talking and noise in and near the said meeting-house, and in the hearing of, and to the disturbance of, the said people then and there assembled for the purpose aforesaid, to the disturbance of the public peace, and against the peace and government of the United States."

The defendant having been convicted upon this indictment, his counsel, *Mr. Dandridge*, moved in arrest of judgment, on the ground that the indictment did not charge any indictable offence.

The offence charged is the unlawful disturbance and hindrance of a congregation assembled in their meeting-house, for the purpose of, and while engaged in, the public worship of Almighty God. It is an offence which tends to subvert those principles of morality which are the foundation of all good government, of all social order, and of all confidence between man and man; for the strongest sanction of those principles has, in all ages and countries, and under all forms of government and of religious

worship, been found in religious faith ; in that relation which subsists between man and his Maker ; the duties of which relation are, in a peculiar manner the subject of all religious instruction.

In order to support this indictment, it is not necessary to maintain that the Christian religion is a part of the common law. Every religious sect is equally protected by our laws. Every congregation assembled for the public social worship of God is, at least, a lawful meeting, and as much under the protection of the law as a political meeting for the exercise of the right of election.

In the case of the *Commonwealth of Massachusetts v. Hoxey*, 16 Mass. Rep. 385, it was decided by the Supreme Judicial Court of that State, that an indictment lies, at common law, for disorderly behavior in town-meetings. The indictment concluded "against the form of the statute," but the case was found not to be within its provisions.

The Court, having decided that those words might be rejected as surplusage, said, "The remaining question is, do the facts charged amount to an offence at common law?"

"On this question, we entertain no doubts. Here was a violent and rude disturbance of the citizens lawfully assembled in town-meeting, and in the actual exercise of their municipal rights and duties. The tendency of the defendant's conduct was to a breach of the peace, and to the prevention of elections necessary to the orderly government of the town and the due management of its concerns for a year. It is true, that the common law knows nothing perfectly agreeing with our municipal assemblies ; but other meetings are well known and often held in England, the disturbance of which is punishable at common law as a misdemeanor. In this Commonwealth, town-meetings are recognized in our constitution and laws, and the elections made, and the business transacted at those meetings, lie at the foundation of our whole civil polity. If, then, there were no statute prohibiting disorderly conduct at such meetings, an indictment for such conduct might be supported."

So an indictment at common law, in England, will lie for "unjustly and irreverently disturbing and hindering the curate of a parish in the exercise of his office and the reading of divine service." 2 Chitty, Cr. L. 21 ; Tremaine's P. C. 239. That, it is true was for the disturbance of divine service as established by law. But in this country there is no established church, all being equally protected by law ; and each sect having as perfect a right to be free from disturbance in the public worship of God according to their own forms, as the established church in England has by the common law.

The principles upon which the disturbance of public worship becomes an offence at common law, are these: Every man has a perfect right to worship God in the manner most conformable to the dictates of his conscience, and to assemble and unite with others in the same act of worship, so that he does not interfere with the equal rights of others. The common law protects this right, either by giving the party his private action for damages on account of the injury he has sustained; or if the violation of the right be directly, or consequentially injurious to society, by a public prosecution. And whenever the injury is common to an indefinite number of persons, so that no one has a greater right to sue than another, the private injury is merged in the public wrong, and becomes the proper subject of public prosecution; as in the case of nuisance, and of fraud. When the act is not only injurious to an indefinite number of persons, but is, in itself, morally wrong, and tends to subvert the foundations of social order, or to a breach of the peace, these principles apply with double force. The public morals are under the protection of the common law; and every open and public attempt to corrupt them is an offence against that law. It is upon this principle that the publication of obscene writings or prints, gross and public blasphemy and scoffing at religion, public lewdness, indecent public exposure of the person, common houses of prostitution, and even the frequenting of such houses, have been adjudged to be offences against the common law.

The disturbance of public worship is an act tending to destroy the public morals, and to excite a breach of the peace; and it is a common injury to an indefinite number of persons, neither of whom could sue alone, unless, as in the case of nuisance, he should have received some special and peculiar damage over and above the common injury sustained by the others; it is, therefore, an offence within the principles before stated, and liable to be prosecuted by indictment at the common law.

The motion in arrest of judgment is, therefore, overruled.



NEG. REBECCA HOBBS v. THOMAS MAGRUDER AND WASHINGTON ROBEY.

The sale, in the District of Columbia, of a Maryland slave brought here by her owner, does not give the slave a title to freedom under the Maryland statute of 1817, c. 112, which prohibits the sale to a non-resident of the State, of any slave having a contingent right to freedom.

PETITION FOR FREEDOM. *Mr. W. L. Brent*, for the petitioner.
Messrs. Swann and C. Cox, for the respondent.

CRANCH, C. J., delivered the opinion of the Court, (THRUSTON, J., absent.)

The facts of this case appear to be as follows : Margaret Stockett, being the owner of the petitioner as a slave for life, by her will made the following bequest to her daughter Eliza Ann Stockett.

“After all my just debts are paid I give and bequeathe to my daughter Eliza Ann, all my property, both real and personal ; and in case the said Eliza Ann should die without having an heir lawfully begotten of her body, it is then my wish and will that my negroes are to be free, and all the residue of the property to go to my nephew, George Henry McGill, to him and his heirs forever.”

Eliza Ann intermarried with Thomas Jones, a resident of the District of Columbia, and came to reside in this district with her husband, who brought the petitioner here and sold her to the defendant, Magruder ; the said Eliza Ann, at the time of the sale, having had no issue of her body ; but having, since the sale, had issue of her body lawfully begotten, and now living.

The petitioner claims freedom under the Act of Maryland of 1817, c. 212.

The first section of the act provides that no person shall knowingly sell or dispose of, to a non-resident of the State, any servant or slave who may be entitled to freedom upon any contingency, nor for a longer term than he is bound to serve, under the pain of penitentiary punishment, upon conviction on indictment in the county where the seller resides.

The second section punishes the non-resident purchaser of such a servant or slave.

The third section provides that no sale of such a servant or slave shall be valid unless in writing under the hands and seals of the seller and purchaser, &c. ; and if the sale should be made without a compliance with the prescribed forms, the slave shall be free, unless the court or jury should be of opinion, that no fraud was intended by the omission of any one of the requisites.

The sale was made in the District of Columbia, without a compliance with the requisites of the law of Maryland.

Without deciding whether the petitioner had or had not a contingent right to freedom at the time of the sale,

The COURT is of opinion that as the Act of Maryland is of no force in this district, the sale here cannot be considered such a violation of the law of Maryland, as can give the petitioner a right to freedom.

Affirmed by the Supreme Court of the United States. 9 Peters, 461.

NEGROES ELIZA AND KITTY CHAPMAN v. ROBERT FENWICK.

A testatrix charged her lands, as well as her personal assets, with the payment of her debts and legacies, and by her will manumitted certain of her slaves, to take effect at her death.

The personal assets were not sufficient, without the slaves, but with the real estate were more than sufficient to pay the debts. *Held*, that such manumission was not in prejudice of the creditors, and that the slaves were entitled to their freedom.

If the manumission is to be considered as a specific legacy, the assent of the executor was given by suffering the negroes to go at large as free for a period of eight years after the death of the testatrix.

If there be a fund for the payment of debts and pecuniary legacies, the executor may be compelled to assent to a specific legacy.

A specific legacy shall not abate or contribute, if there be enough without it.

A devise of real estate, "after payment of the debts," is a charge of the debts upon the real estate.

An assent to a legacy cannot be revoked.

Emancipation by will stands on stronger ground than a specific legacy, and does not need the assent of the executor.

The burden of proof lies on the creditors to show that an emancipation by will is "in their prejudice."

THIS was a petition for freedom under the will of Mrs. Frances Edelin, and the Act of Maryland of 1796, c. 67, § 13.

Mr. Key, for the petitioners, cited two cases decided by this Court, namely, *Negro Jo. Thompson v. Clarke*, June, 1817, (2 Cranch, C. C. 145,) and *Negro Fidelio v. Dermott*, June, 1807, (1 Cranch, C. C. 405;) *Gainsborough v. Gainsborough*, 2 Vern. 252; 2 Fonb. 291.

Mr. W. L. Brent, for the respondent, cited and relied upon the case of *Negro George v. Corse's Administrator*, 2 Har. & Gill, 1.

CRANCH, C. J., delivered the opinion of the Court. (THRUSTON, J., absent.)

Mrs. Frances Edelin, the then owner of the petitioners, on the 2d of November, 1825, made her will, in which she says, "After my debts and funeral charges are paid, I devise and bequeathe as follows: I give and bequeathe to my nephew John B. Edelin, the store-house and lot," &c., (describing it). She then goes on to make sundry other devises of real estate, the last of which is to her nephew Richard James Edelin, of a small house and lot, "with the proviso that the negroes which are hereinafter mentioned to be free, to live in the back room of the said house." She then bequeathes to the same nephew a mulatto man named Henry, and to her nephew John B. Edelin she gives a negro boy named John; to her brother George, a black man named Bill; and to her niece Eliza Queen, a negro girl named Harriett, and a locket and ring. Then follows this clause:

"*Item*, negro woman Letty, her daughter Kitty, a mulatto, with her three children, to wit, Eliza, Robert, and Kitty Jane, with future increase, and an old woman named Lucy, I do hereby

declare them free at and after my death ; and they shall have the right to live in and occupy the back-room in the house and lot I have given and bequeathed to my nephew, Richard James Edelin. To the two older negro women I give them and bequeathe ten dollars a year to each of them as long as they live ; and ten dollars a year, during two years after my death, exclusive of the year in which I die, to mulatto Kitty."

She then charges the land, devised to her nephews, with annuities of ten dollars to each of the negroes, Lucy, Letty, and Kitty.

Exclusive of the specific devises and bequests, her estate was insufficient to pay the testatrix's debts ; and it is admitted that the personal estate alone, exclusive of the value of the petitioners, was also insufficient without the aid of the real ; but that the real and personal estate, exclusive of the value of the petitioners, was sufficient.

From the death of the testatrix, in November or December, 1825, until July, 1833, the petitioners have been suffered by the executor to go at large, and act as free.

On the 16th of July, 1833, upon the *ex parte* petition of the executor, stating that the testatrix, by her will, directed that certain of the negroes contained in the inventory, should be free, after her death ; that he has since discovered that there will not be assets enough to discharge her debts, and praying that the negroes may be sold ; the Orphans' Court ordered the executor "to sell all the personal estate."

By the executor's account, settled with the Orphans' Court on the same 16th of July, 1833, in which he is charged with these negroes, valued at \$805, the balance against him appeared to be \$745.90, which, by a subsequent account rendered on the 12th of November, 1833, he appears to have accounted for to the satisfaction of the Orphans' Court ; so that, if the petitioners obtain their freedom, he will have overpaid the sum of \$752.27. But the executor had, between July and November, 1833, sold the petitioners to the defendant, Robert Fenwick, so that, if the petitioners obtain their freedom, the executor will have to refund the purchase-money to the defendant, and look to the real estate.

The question for the decision of the Court, is, whether, under these circumstances, the manumitting clause of the will be, or be not, "in prejudice of creditors ?"

By the Act of Maryland of 1796, c. 67, § 13, it is enacted, "That it shall be lawful for any person or persons competent, in law, to make a valid will, to grant freedom to, and effect the manumission of, any slave or slaves belonging to such person or persons, by his or their last will ; and such manumission may be made to take effect at the death of the testator, or at such other

periods as may be limited in such will; but no manumission, hereafter to be made by will, shall be effectual to give freedom to any slave or slaves, if the same shall be in prejudice of creditors."

If the manumission is to be considered as a legacy, the assent of the executor is necessary to perfect the title of the petitioners. For, as the executor is liable for the debts of his testator, to the full extent of the assets, and, as the debts must be paid before legacies, unless the assets are sufficient for both, it is necessary, for his own protection, that he should have the power of withholding the legacies until it is ascertained that the residue of the assets will be sufficient to pay all the debts.

"But, if there is a fund to pay the debts, and the executor then refuses his assent to a legacy, he may be compelled to give it, either by the spiritual court," (in England,) "or by a court of equity." March, Rep. 19; Jac. L. Dictionary, tit. Legacy. In case of deficiency of assets, however, all the general legacies must abate, proportionably, in order to pay the debts; but a specific legacy is not to abate at all, or allow any thing, by way of abatement, unless there be not sufficient without it. *Webb v. Webb*, 2 Vern. 111.

If a manumission by will be a legacy, it is a specific legacy; for it can admit of no satisfaction but the thing itself.

A testator has a right to dispose of all his personal estate, in specific legacies, and charge his lands with the payment of his debts. The creditors have no right to any thing but payment of their debts. It is wholly unimportant to them out of which fund they are paid; and they have no right to compel the executor to sell the property specifically bequeathed, if the fund provided by the will be sufficient. Their remedy at law is against the executor, to charge him *de bonis testatoris*, in the first instance. It is true the executor could not plead *plene administravit* in consequence of delivering to the legatees their respective legacies; but he might raise the money out of the lands, and pay the debts; and it would be his duty to do so; for the will is his law, and he is bound to execute it according to the intention of the testator. And when lands, devised to an executor, for payment of debts, are sold by the executor, the money in his hands will be assets at law. *Hawker v. Buckland*, 2 Vern. 106; *Greaves v. Powell*, 2 Id. 248; *Anon.* 2 Id. 405.

It seems to us clear, that, by this will, the testatrix has charged her real estate as well as her personal, with the payment of her debts.

She commences her will, thus: "After my debts and funeral charges are paid, I devise and bequeathe, as follows: I give and

bequeathe to my nephew, John B. Edelin, the store-house and lot," &c., and this devise is followed by other devises of real estate to other nephews, and, among others, to Richard James Edelin; and she makes those two nephews her executors, together with John Brown.

These devises were to take place only after her debts and funeral charges should be paid; and she makes two of her devisees her executors. The word "devise" is exclusively applicable to real estate. In the case of *Trott v. Vernon*, 2 Vern. 708, the Lord Chancellor says: "It is but natural to suppose that all persons would provide for the payment of their just debts; and, directing them to be paid in the first place, imports, that, before any devise by his will should take place, his debts, &c., should be paid;" and he seemed to lay some stress upon the word "devise," and decreed the real estate to be liable to the payment of the debts. (See, also, *Beachcroft v. Beachcroft*, 2 Vern. 690.)

When the real and the personal estate are both liable to the payment of the debts, it is entirely immaterial to the creditors whether either of them be or be not insufficient, by itself, if both together are sufficient; and, in such case, the bequest of a specific legacy cannot be said to be in prejudice of creditors. A will must be so construed and so executed as to carry into effect the whole intention of the testator. Here it was as clearly the intention of the testator that the petitioners should have their freedom, as that the debts should be paid.

If emancipation by will is to be considered as a specific legacy, to which the assent of the executor is necessary, that assent was given when the petitioners were permitted by him to go at large and act as if they were free; which they did, from the death of the testatrix, in 1825, to the year 1833. Much slighter circumstances than this have been considered sufficient evidence of the assent of an executor to a legacy. Wentworth (Office of Executor, 225,) says, "There may be an assent implied as well as express; for if, in the devise or bequest, the legatee be appointed to do some act, as in respect of the legacy, and the executor doth accept the performance thereof, this amounteth to an assent." "So, if a horse be bequeathed, and one, offering to buy him of the executor himself, he directeth him to go and buy the horse of the legatee; or if the executor himself offer money to the legatee, for the horse, this implieth an assent that it should be the legatee's, by the will." And in *Bac. Ab. Legacy, L.*, it is said that "any expression or act done by the executor which shows his concurrence or agreement to the thing demised, will amount to an assent." Godolphin, 148; Plowden, 525; 1 Vern. 90 - 460; 2 Id. 358. And Wentworth, in p. 226 and 227, says: "If the executor do once declare his assent that the legatee shall have his

legacy, he may then enter into it, or take it, notwithstanding the executor's countermand or revocation of his assent after." And in *Bac. Ab.* it is said, that, "as an assent is but a perfecting act, the executor cannot, after he has once given it, revoke the same; neither can it be given on condition, or on any limitation or restriction whatsoever. *March*, 136; *Cro. Jac.* 614, 615; 2 *Vent.* 360; 1 *Leon.* 130, 131." And in *Burnley v. Lambert*, 1 *Wash.* 312, the Court of Appeals of Virginia say: "After the assent of the executor, the legal property is completely vested in the legatee, and cannot, at law, be divested by the creditors."

If the emancipation be a specific legacy, and if the assent of the executor has not been given; inasmuch as the real and personal estate are both equally charged by this will; and as that fund is admitted to be sufficient without the value of the petitioners, he may be compelled to assent.

But emancipation stands on stronger ground than a specific legacy. The assent of the executor is not necessary to the perfection of the title. By the general provision of the 13th section of the Maryland Act of 1796, c. 67, the manumission is complete and perfected; but liable to be defeated if it be "in prejudice of creditors;" a fact which is to be proved by the party denying the validity of the manumission. There is, in this respect, a marked distinction between the language used in the Act of 1752, and that used in the Act of 1796. The language of the fifth section of the former act is, "that any deed or writing whereby freedom shall be given," &c., "shall be good," &c., "so that such deed or writing be not in prejudice of creditors."

The words, "so that," are here equivalent to "if;" and the construction would be the same as if the language had been "any writing," &c., shall be good, if it shall not be "in prejudice of creditors," and then the party claiming title to freedom would be obliged to show that the writing was not in prejudice of creditors. But the language of the Act of 1796, after expressly repealing the Act of 1752, is, "it shall be lawful for any person capable in law to make a valid will, to grant freedom to, and effect the manumission of, any slave, &c., by his last will;" "but no manumission, hereafter to be made by will, shall be effectual to give freedom to any slave or slaves if the same be in prejudice of creditors."

Here the same rule of construction, which, under the Act of 1752, would require the party claiming freedom under a writing, to show that the manumission would not be in prejudice of creditors, requires of the party denying the efficacy of the manumission, under the Act of 1796, to show that the manumission is in prejudice of creditors. The words, "so that," in the Act of 1752, and the word, "if" in that of 1796, create a condition.

Under the first, the manumission itself is conditional ; under the second, the inefficacy of the manumission is conditional. Hence, the burden of proof, under the former act, was upon the claimant of freedom ; under the latter it is upon the other side.

It is not, however, material, in the present cause, on which party the burden of proof lies ; for the fact is admitted, that the real and personal estate are sufficient, without the value of the petitioners, to pay all the debts, so that the manumission cannot be in prejudice of creditors.

But here we are met by the judgment of the Court of Appeals in Maryland, in the case of *Negro George v. Corse*, 2 Harris & Gill, 1, in which it was decided by three of the judges that in a suit by negroes against the executor of the will of a testator who manumitted the negroes by his will, and expressly directed his real estate to be sold by his executor for the payment of his debts, if the personal estate, exclusive of the negroes, should be insufficient to pay all his debts, the question could not be decided whether the manumission was in prejudice ; because the executor was not competent to admit the fact, that the real and personal estate, exclusive of the negroes, was sufficient to pay all the debts ; and the reason, given by one of the judges, is, that " it would be an issue to which the creditors are no party, and to protect whose interest nobody appears." That, " as far as relates to the personalty, the executor is competent to act for all who are concerned ; but in trying the facts whether there be assets by descent in the hands of the heir, and what is the amount thereof, he has no interest, either personally or in right of representation. *Virtute officii* he is neither bound to acquire, nor presumed to possess, any knowledge upon the subject. With the title he is unacquainted ; with the value of the land, equally uninformed."

In this opinion we are unable to concur. When lands are devised to the executor to be sold for the payment of debts, or when the lands are charged with the payment of the debts, and a power is given to the executor to sell them, the lands are as much a fund in his hands for that purpose, as the goods and chattels ; and he represents the creditors, in regard to the lands, so far as their interests are concerned, as much as he does in regard to the personal estate ; and the creditors are as much a party to the issue in respect of the lands, as they are in respect of the goods and chattels. When he is charged with the sale of his testator's lands, for the payment of debts, he is as much bound to inquire in regard to the lands as he is in regard to the personal estate ; for it is his duty to execute the whole of his testator's will ; and in such a case the creditors have as good a right to look to the land, through him, for the payment of their debts, as they have to look to the goods and chattels through him.

If under such a will, the sufficiency of the real estate for the payment of the debts cannot be tried in a suit against the executor, and if the negroes are bound to show that the manumission is not in prejudice of creditors, how can they obtain their freedom?

Their only remedy is by petition, in a court of law, against the person who claims them as slaves. Neither the heirs nor the creditors can be made parties; for neither of them claims title to the petitioners; and if the executor does not represent the creditors, are they represented by the vendee of the executor? and will his admission of the sufficiency of the real estate be more prejudicial to the creditors than that of the executor?

If every manumission, by will, is taken to be *primâ facie* in prejudice of creditors, and if the burden of proof be on the petitioners, nothing seems to us more clear than that it is competent to them to show, either that there are no creditors to be prejudiced; or that, if there be creditors, they cannot be prejudiced; whoever may be the person claiming to hold them under the testator. It would be strange indeed, if, in a suit against the only person claiming title to them, and the only person against whom they can maintain a suit to vindicate their right, they should be forbidden to give evidence of the fact which it is contended they are bound to show before their title can be complete. Can it be said, that they are to wait until some creditor shall have obtained judgment against the executor *de bonis testatoris*, and have seized the petitioners as a part of those goods? This would put it in the power of the executor to postpone, indefinitely, the enjoyment of their right, in case the fund provided by the testator for the payment of the debts should be sufficient.

It would, however, probably, be admitted by the judges of the Court of Appeals in Maryland, who decided the case of *George v. Corse*, that, in such a suit it is competent for the petitioners to show that there was a sufficiency of personal estate; but not of the real, although the fund provided by the testator for the payment of the debts should be the proceeds of sales of real estate to be made by the executor for that purpose. But, for the reasons before stated, we think there is no difference, in this respect, between the right of the executor in such a case, and in such a suit, to represent the creditors, in regard to the real estate, and his right to represent them in regard to the personal estate.

Upon the whole, therefore, we are of opinion, that, in the present case the testatrix, by her will, bound her real estate as well as her personal, for the payment of her debts; and that, as it is admitted by the defendant, who is the vendee of the executor, that the real and personal estate of the testatrix, exclusive of the petitioners, was, at her death, sufficient to pay all her debts, the man-

Gunton v. Ingle.

omission of the petitioners, by the will, was not in prejudice of her creditors, and that the judgment upon the case stated, must be rendered for the petitioners.

W. GUNTON *et al.* v. EDWARD INGLE *et al.*

An information in the nature of a writ of *quo warranto*, may be sustained against a person usurping an office under a private corporation; but it is in the discretion of the Court to grant it, or not.

The information must show that the office usurped is a corporate office.

It must be a case in which the Court would have power to impose a fine; a case in which the public is concerned, or in which the authority of the United States is contemned or abused.

Although an information has, in effect, become a civil proceeding, yet its form is criminal.

The information may be amended; and it seems, that the usurper may be amoved, and a *mandamus* granted to hold a new election.

UPON affidavit filed, *Mr. R. S. Coxe* moved for a writ, in the nature of a *quo warranto*, against the defendants, to show by what authority they claim to hold the office of President and Directors of "the Washington, Alexandria, and Georgetown steam-packet company."

The suit is brought to try the validity of the election; the judges of the election not having been appointed by the president and directors, according to the provisions of the 3d and 4th sections of the charter. (Davis's Laws of D. C. 401.)

Mr. Wallach, contra. It was the fault of the relators themselves, that judges were not appointed. They do not state that the new election was not authorized by the by-laws.

Mr. Coxe, in reply. If the president and directors have not done their duty, their neglect does not make the election valid.

The COURT (THRUSTON, J., not voting,) ordered the writ to issue, returnable on the first Monday of March next.

The COURT having permitted an information in the nature of a writ of *quo warranto* to be filed, the defendants filed a general demurrer.

Mr. Wallach, for the defendants, contended, and objected,

1. That the information does not state that the right exercised by the defendants is to an office of a public nature. *The King v. Shepherd*, 4 T. R. 381; *Lord Bruce's case*, 2 Str. 819; *The King v. Mein*, 3 T. R. 596; *Rex v. Daubeney*, 2 Str. 1196.

2. That the affidavit is insufficient.

3. That the information is against divers persons for divers and distinct offices. *Rex v. Warlow*, 2 M. & S. 75; *Rex v. Barzey*, 4 M. & S. 253.

Mr. Carlisle, contra. The information, in this case, is copied from Jac. Law. Dict. which does not show that it was a public corporation. Jac. Law Dict. tit. *Quo Warranto*; *Commonwealth v. Griffith*, 2 Dal. 112.

It is not necessary that it should be a public franchise. In England, a rule of court must be obtained to authorize the attorney-general to file an information. *Whiteham v. Jokeham*, Ca. Temp. Hardwicke, 143; *Lowther's case*, Ld. Raym. 1409; *Lowther's case*, Str. 637.

But in this country, the Court leaves it entirely to the attorney-general; and in all cases where the office is created by charter, an information lies. Angell on Corp. 476, 478, 480; *Commonwealth v. Arrison*, 15 Serg. & R. 127; *Attorney-General v. Utica Ins. Co.* 2 Johns. Ch. Rep. 371; *Commonwealth v. Union Ins. Co.* 5 Mass. Rep. 231; *People v. Utica Ins. Co.* 15 Johns. 358.

Mr. R. S. Coxe, on the same side. This is not now a question of discretion, whether the information shall be filed. It has been ordered, or received by the court; and the question is now upon the demurrer.

It is not necessary to aver a charter, for a *quo warranto* lies to try the validity of a charter. The precedent in Rast. Ent. 540, (b) does not aver a charter. The affidavit on which the information was ordered, refers to the 4th section of the charter, &c. The information states that the defendant usurped the office of president of the Georgetown, Alexandria, and Washington Steam-packet Company, (the corporate name.)

The charter is a public act, and the Court is bound to notice it.

The writ of *quo warranto* was originally a criminal proceeding, but it has now become a mere civil remedy, and no more precision is required than in civil cases. It is not necessary to aver that it was the usurpation of a chartered right. In this country, there is no difference, in this respect, between a public and a private corporation. Case of Dartmouth College, 4 Wheat. 518; *Smith v. Boucher*, Ca. Temp. Hardwicke, 143; *People v. Supreme Court*, 5 Wend. 120.

As to the objection, that it is against several persons; the president and directors constitute the legislature of the corporation. They are chosen jointly. It is but one election. It is but one usurpation. If void as to one, it is void as to all.

Mr. Bradley, for the defendants. *Quo warranto* will not lie for usurping the franchise of a private corporation. This information is only warranted by the statute of Anne, and that applies only to municipal corporations, such as a city, a town, a borough, &c. *Rex v. Nicholson*, Str. 299; *Rex v. Lewis*, Str. 835; Angell, 476.

The New York case cited, is upon the New York statute, which is copied from the statute of Anne. The cases cited from Pennsylvania and Massachusetts, are not applicable, for they have no court of equity in which a remedy could be had. Where there is a court of equity, a remedy may be had by injunction.

All the precedents state the rights usurped to be corporate rights, and that there was a charter. 6 Wentworth, 62, &c.

Mr. Coxe, in reply. All the forms in Wentworth, are against private corporations.

CRANCH, C. J. This is an information in the nature of a *quo warranto*, charging that the defendants use and exercise the office of president and directors of the Washington, Alexandria, and Georgetown steam-packet company, without any warrant or lawful authority therefor, which said offices they have usurped, and still usurp to the great damage of the lawful authority of the United States.

To this information the defendants demur,

1st. Because the offices, said to be usurped, are not averred to be offices of a public nature.

2d Because the information is against divers persons, for divers and distinct offices.

I am satisfied that an information may be sustained at the relation of a private person against a person usurping an office under a private corporation; that it is in the discretion of the Court to allow, or to refuse to allow such an information to be filed.

I am also of opinion that, in the present case, the information is defective in not showing that the offices exercised by the defendants, are corporate offices. They may be offices held under a company, or limited partnership assuming to itself the name of the Washington, Alexandria and Georgetown steam-packet company. There was once a private association bearing that name; and, for any thing that appears to the contrary in this information, it may still exist, and be the company named therein.

Every thing averred in the information may be true, and yet the Court may have no authority to interfere by an information in the name of the United States. It must be a case in which the Court would have power to impose a fine. It must be a case in which the public is concerned, or in which the authority of the United States is contemned or abused. For although an information in such cases has become, in effect, a civil proceeding, yet its form is criminal, and indicates that the cases in which it may be used, are such as directly or indirectly concern the public.

But I think it is competent for the relator, with the leave of the Court, to amend the information.

If the information should be amended, and the Court should be

of opinion that the election of the defendants to the offices they claim was illegal, I think they may be amoved, and a mandamus awarded to the president and directors to hold a new election.

MORSELL, J., concurred. THRUSTON, J., did not sit in the case. (See also 2 B. & A. 485; 10 Johns. 496; Doug. 524.)

JAMES K. PLANT v. JOHN HOLTZMAN *et. al.*

The confession of judgment, in order to operate as a supersedeas, must be made in the very words of the statute of Maryland, 1791, c. 67; and an execution issued upon a judgment confessed in any other form by way of supersedeas, is null and void, and the justice who issued the execution, the constable who served it, and the party who ordered it, were trespassers, and liable to the party injured thereby, for his damages.

TRESPASS, against the justice of the peace, who issued five writs of *fieri facias* against the plaintiff upon five supersedeas judgments supposed to have been confessed by the plaintiff, but not confessed in the form required by the statute. The only evidence of the confession of judgment was an indorsement by Mr. Justice Clark on the warrant of arrest of one Richard Wright at the suit of the present defendants, James and Alexander Heron, in these words, "Superseded June 29th, by James K. Plant."

Mr. C. Cox, for the defendants, contended that it was not necessary that the certificate of the confession should be made out in full and signed by the justice. And the uniform practice had been otherwise; and that the justice's indorsement that the debt was superseded, was conclusive.

CRANCH, C. J., delivered the opinion of the Court (*nem. con.*)

This is an action of trespass brought by James K. Plant against John Holtzman, a justice of the peace, and James and Alexander Heron, for causing five writs of *fieri facias* to be levied on the goods of the plaintiff, at the suit of the defendants, James and Alexander Heron.

The facts of the case appear to be as follows: The plaintiff's goods were seized by one Trunnell, a constable, upon five writs of *fieri facias* issued against the plaintiff by the defendant Holtzman, whose only authority for issuing the same was the following indorsement on each of five warrants of arrest issued by John Cox, a justice of the peace for the county of Washington, against one Richard Wright, at the suit of the other defendants, James and Alexander Heron, namely, "1833. June 6th. Judgment for plaintiff confessed. Debt, forty-five dollars and two cents, on interest from date; cost, fifty-eight cents. John D. Clark. Superseded June 29th, by James K. Plant. John D. Clark." The said

John D. Clark was a justice of the peace for the county of Washington.

The original warrant of arrest, issued by Mr. Justice Cox, commanded the constable to have the said R. Wright "before a justice of the peace," for the said county, on the 8th of June, 1833, to answer to James and Alexander Heron, "in a plea of debt under a warrant."

By the second section of the Act of Congress of the 1st of March, 1823, [3 Stat. at Large, 743,] extending the jurisdiction of justices of the peace in the District of Columbia, it is enacted, "That in all cases where judgments shall be rendered by a justice of the peace, it shall be lawful for the defendant to supersede the said judgment at any time within sixty days from the rendition of the same; which supersedeas shall stay execution for six months thereafter, and shall be taken by the justice who rendered the judgment, and no other." And by the 9th section, it is provided, "That any justice of the peace before whom supersedeas may be taken, or any other justice of the peace of the said county, may and shall, at the request of the plaintiff," &c., "issue execution, by way of *capias ad satisfaciendum*, or *feri facias*, against the principal debtor and his sureties, or against either of them, after the expiration of the time so mentioned in the said supersedeas."

That act does not prescribe the form or manner of superseding a judgment. This is done by the Maryland Act of 1791, c. 67; by the first section of which act, it is enacted, that no execution shall issue upon any judgment obtained in the Court of Appeals, or General Court, or upon any decree in the Court of Chancery, provided the person against whom such judgment or decree is obtained, shall come before one judge of the General Court, one of the justices of the County Court, or two justices of the peace of the county, &c., "within two months after the rendition of such judgment, and, together with two other persons, such as the said judge," &c., "shall approve of, confess judgment for his debt, and costs of suit, adjudged or decreed, with stay of execution for six months thereafter, which confession shall be made in manner and form following; that is to say, you, H. M., A. B., and C. D., do confess judgment to E. F. for the sum of and

costs which were recovered by the said E. F. against H. M. on the day of in the court; the said to be levied of your bodies, goods or chattels, lands or tenements, for the use of the said E. F., in case the said H. M. shall not pay and satisfy to the said E. F. the said so as aforesaid recovered against him, with the additional costs thereon, on the day of next;" which confession shall be signed by the said "judge, justice, or justices, before whom the

same is made, and certificate thereof shall be procured under the hand or hands, of the said judge, justice, or justices, and such certificate shall be a sufficient supersedeas to the sheriff to forbear serving execution upon the body or goods of the person so obtaining such certificate."

By the third section it is enacted, that no execution against any person shall issue on any judgment rendered by a single magistrate, provided such person shall go before any justice of the peace of the county within two months, &c., "and together with security, such as the justice shall approve of, confess judgment for the debt and costs of suit adjudged, with stay of execution as aforesaid; which confession shall be in manner and form as aforesaid; and shall be signed by the justice taking the same; and certificate thereof shall be procured under his hand, which shall be a sufficient supersedeas as aforesaid."

It is admitted, that Mr. Justice Clark did not take the confession of judgment in the manner and form prescribed in the act; having never spoken to the debtor and his surety the precise words required by the act to make a valid confession, or recognizance; and that no such words had been spoken or written by Mr. Justice Clark, or certified to Mr. Justice Holtzman before the executions were issued and served. Mr. Justice Clark, however, has, since the service of the executions, signed a paper purporting to be a confession of judgment something like that required by the act; but what words were addressed by the justice to Mr. Wright and Mr. Plant, or what words were spoken by them to him, which he thought justified him in writing the words, "superseded by James K. Plant," on the back of the warrant of arrest, do not appear. That indorsement does not affirm that Mr. Wright confessed a new judgment jointly with Mr. Plant.

The power of the justice to render a new judgment upon the confession of the debtor and his surety, is a special power given by statute, and to be exercised in a precise and exact form; and the general rule is, that such an authority must be strictly pursued, or the act is a nullity.

It is stated that the entries on the justices' docket, and the judgment of the justice, were the only forms then generally observed. Those entries are the same which are before mentioned as having been indorsed on the original warrants of arrest. They are certainly not the forms required by the statute to constitute a valid confession of judgment. A mere declaration by any person, that he is willing to supersede a judgment for the debt of another, is not such a solemn confession of judgment as the act requires.

The debtor and his surety should go before the magistrate at the same time, and should enter into recognizance in the

United States v. Goddard.

very words required by the act; and the magistrate should not certify that to be done which was not done. In order to prevent mistakes and misunderstandings in so important a matter as a confession of judgment, which may involve a man in ruin, the legislature has thought proper to give a peculiar solemnity to the transaction, and to require it to be done in a precise form. If not done in that form, it cannot be a judgment; for the whole validity of the transaction is derived from the statute itself, and it must be done exactly according to the prescribed forms, or it is of no avail. The legislature has required certain forms and ceremonies. The magistrate dispenses with them. If this can be done, there is no use in making laws. Whatever may have been the practice of Mr. Justice Clark, or any other magistrate, it cannot alter the law.

In the present case, the confession of judgment, not having been made in the manner and form required by the statute, no judgment was rendered against Mr. Plant, and Mr. Justice Holtzman had no authority to issue the writs of *fieri facias*, and he and the other defendants who procured the writs, and the constable who served them, must be considered as trespassers.

See also Bac. Ab. Trespass, D; *Yeates v. Lansing*, 5 Johns. 290. The case of the *Marshalsea*, 10 Co. 68; *Terry v. Huntingdon*, Hardres, 480.

UNITED STATES v. JOSEPH GODDARD.

Nine cows, belonging to divers persons, were stolen by the defendant from the commons, in or about the city of Washington; and the grand jury found nine separate indictments. Six were averred to be on the same day; the Court refused to quash any of them.

THE grand jury found nine indictments against the defendant for stealing nine cows belonging to nine different persons. Six of them were charged to have been stolen on the same day, the 14th of October, 1833.

Mr. Z. C. Lee, for the defendant, moved the Court to quash the six indictments in which the thefts were charged to have been committed on the same day, insisting that the six indictments were all for one and the same offence; and cited 1 Chitty, Cr. L. 254. The defendant may be punished six times as much as if the whole were included in one indictment; and the United States will be charged \$90 for attorney's fees in nine cases, when, in truth there was but one theft, and one attorney's fee of \$10, only should be charged.

Mr. Key, District Attorney, *contra*. It does not appear that it was only one theft because charged on the same day. If all had been charged in one indictment, the defendant might have objected ; but he cannot object to their being separately charged.

Mr. Hall, for the defendant, in reply. It is an application to the discretion of the Court. If the attorney might have joined them in one indictment, they ought to be so joined.

The COURT (THRUSTON, J., *contra*,) refused to quash any of the indictments ; because it did not appear to them that the cows were all stolen at the same time and place. It is true that they were all averred to have been stolen in this county ; and six of them on the 14th of October, 1833 ; but as the day was immaterial, and perhaps could not be exactly ascertained in evidence, and it was competent for the United States to prove that they were stolen on different days, and if so were separate acts of stealing, and separate offences, the Court could not say they were not ; and would do wrong to quash them, especially as the cows belonged to divers persons. If they had all been contained in one indictment the defendant might have objected to it, and perhaps have obliged the Attorney of the United States to make his election as to which theft he would prosecute ; and if they had been charged in separate counts, as they should if they were separate offences, the punishment might be exactly the same as if they had been charged in separate indictments ; for each offence must have its separate punishment ; and the only difference would be in the costs. If one only, of the six, should be retained for trial, who should say which it should be ? and perhaps the one selected might be the only one which the United States could not support.

See *Beerman's case*, at March term, 1833, *post*.

BANK OF THE UNITED STATES v. GEORGE WATTERSTON.

A mistake in the date of the note will not invalidate the notice given to an indorser.

ASSUMPSIT, against an indorser. The notice left by the notary with the defendant was of a note dated in 1832, when the true note was dated in 1830. In all other respects the notice was correct.

The COURT (*nem. con.*) was of opinion upon the authority of *Mills v. Bank of the United States*, 11 Wheaton, 431, that the notice was sufficient.

Judgment for the plaintiff.

NEGRO ROBERT THOMAS v. ELIZABETH MAGRUDER.

A record copy of a deed of emancipation may be given in evidence by the petitioner, upon trial of a petition for freedom, without producing the original or accounting for its non-production.

PETITION FOR FREEDOM.

On the trial, *Mr. Key*, for the petitioner, offered in evidence the record of the deed of manumission from Reginald Magruder, recorded in the office of the clerk of this Court.

Mr. Z. C. Lee, objected and called for the original, and proof by the subscribing witnesses.

The COURT (MORSELL, J., absent,) refused to require *Mr. Key* to produce the original, and permitted him to use the copy on the record; it having been acknowledged and recorded according to the Act of Maryland, 1796, c. 67, §§ 28, 29.

UNITED STATES v. JOHN LEE.

A note at sixty days with interest, will not be admitted in evidence to support an averment of a note at sixty days without interest.

A man who does not believe in the existence of a God, other than Nature; nor in a future state of existence, is not a competent witness.

Quere, whether a promissory note found in the hands of the maker, with two blank indorsements, can be considered as the property of the maker, and whether it be of any value to him?

If the note was in the pocket-book of the maker of the note at the time the defendant stole the pocket-book, a conviction of stealing the pocket-book is a bar to a subsequent indictment for stealing the note.

INDICTMENT for stealing a pocket-book, of the value of seventy-five cents, and a promissory note for \$200, at sixty days, made by William Emmons, payable to Colonel Ambrose H. Sevier, and indorsed by him and F. E. Plummer, in blank, of the promissory notes and of the goods and chattels of one William Emmons.

The United States attorney called William Emmons as a witness.

Mr. Bryce, for the defendant, objected to the witness on account of his religious opinions, and proposed to examine him on the *voir dire*, and cited 2 Russell, 590; *Jackson v. Gridley*, 13 Johns. 99; *Norris's Peake*, 261; and *Hunscom v. Hunscom*, 15 Mass. Rep. 184.

The COURT, however, inclined to refuse to examine the witness on the *voir dire*, and the counsel for the defendant did not press it; and *Mr. Bryce* himself was sworn and testified, that in conversation with *Mr. Emmons*, some weeks ago, in answer to a

question, he said that he did not believe in the existence of a God or of a future state of rewards and punishments.

Mr. Emmons was permitted, at his own request, to explain his belief. He said he believed Nature to be God; and God to be Nature; and that in him we live and move and have our being. That he did not think himself more bound to speak the truth by being sworn on the Bible, than on any other book. That when a man died, he died like a tree, and was resolved into his original elements, and that intelligence was the consequence, and not the cause, of organization.

The COURT (CRANCH, C. J., and THRUSTON, J., doubting,) rejected the witness, and did not suffer him to be sworn.

Mr. W. S. Brent, for the defendant, objected to giving the note in evidence because it is for \$200 at sixty days with interest, and the note is described in the indictment as a note for \$200 at sixty days without interest; and because there is no evidence that it is the property of Emmons. It is indorsed by Colonel Sevier and Mr. Plummer in blank, so that it appears to be the property of Plummer or his indorsee, not of Emmons the maker of the note.

Mr. Key, United States attorney, *contra*. The description is true as far as it goes. It is a note for \$200. It is valuable to Emmons as a letter of credit; and because he could raise money upon it.

The COURT (THRUSTON, J., *contra*,) refused to let the note go in evidence, it not being such a note as is described in the indictment.

MORSELL, J., was also of opinion that it was not a promissory note because never uttered or delivered, and remaining in the hands of the maker.

THRUSTON, J., was of opinion that it was a promissory note within the penitentiary law, and was valuable to the maker because he could raise money upon it, for sixty days; and that it was also valuable to the thief, who might have sold it. He also thought that the note offered in evidence, namely, at sixty days with interest, supported the averment of a note at sixty days without interest; as if the averment had been of a cow; and the cow stolen had been a red cow; the proof of stealing a red cow would have supported the averment of stealing a cow.

CRANCH, C. J., was of opinion that a note for \$200 at sixty days with interest, did not support the averment of a note for \$200 at sixty days without interest.

Verdict, guilty of stealing the pocket-book only; and not guilty of stealing the note.

The grand jury, afterwards at the same term found another indictment for stealing the note, upon the trial of which,

The COURT (*nem. con.*) at the prayer of the defendant's counsel

Deale v. Krofft.

(*Mr. W. L. Brent*,) instructed the jury that if, from the evidence, they should find that the note was in the pocket-book when it was stolen by the defendant, and that he has been convicted of stealing the pocket-book, they ought to find their verdict for the defendant; which they did.

DEALE, for the use of Preston and Orme, v. JOHN M. KROFFT.

The defendant cannot set off the plaintiff's acceptance of the defendant's draft, not due at the commencement of the action, but due before plea pleaded; nor can it be allowed as payment on the general issue of non-assumpsit.

If the last indorser take up a draft when due, he may cancel the names of the prior indorsers without impairing his title to recover as indorsee, against the acceptor.

Quære, whether a payment after suit brought can be given in evidence on the general issue of non assumpsit.

ASSUMPSIT on an open account assigned to Preston and Orme, on the 6th of March, 1833, and notice of the assignment given to Krofft on the 12th of March, 1833.

The defendant gave notice of a set-off, namely, an acceptance by Deale of a draft at five months by Griffith in favor of Wyeth and Norris, due 28th March, 1833.

This suit was brought on the 12th of March, 1833, and the acceptance had become due when the plea was pleaded. It had been discounted with the indorsement of Wyeth and Norris, and of A. & R. R. Griffith, in Baltimore and sent to the Patriotic Bank here for collection, where it was taken up by Griffith, when due, who cancelled the names of the indorsers, and put it into the hands of William Prout, a broker, who passed it to Krofft, who gave him the money for it.

Mr. Prout testified that the names of the indorsers were cancelled only to prevent them from being liable, and not to prevent Krofft from recovering the money of Deale upon his acceptance.

Mr. Fendall, *Mr. Hellen* and *Mr. Brent*, for the plaintiff, contended that the defendant had not shown any title to the draft, as he was no party to it and could not recover upon it at law.

The COURT (MORSELL, J., absent,) was of opinion that the cancelling of the names of the indorsers (blank indorsements,) for the purpose of preventing their liability, did not destroy the effect of the indorsements, so as to prevent the title to the bill from passing to the plaintiff. See *Nevins v. Legrand*, 15 Mass. Rep. 436.

The COURT also decided, that the draft, not being due at the commencement of this action, could not be set off. 2 Saund. on Pl. 790; *Evans v. Prosser*, 3 T. R. 186; *Hutchinson v. Reid*, 3 Campb. 329; *Eland v. Karr*, 1 East, 376; *Rogerson v. Ladbroke*, 1 Bing. 93.

Roach v. Burgess.

Mr. Coxe, for the defendant, then contended that it was a payment; and that payment after the commencement of the action may be given in evidence on the general issue. *Baylies v. Fetyplace*, 7 Mass. Rep. 325; Phil. on Ev.; *Bird v. Randall*, 3 Burr. 1345.

But the COURT said it was not evidence of payment.
Verdict for the plaintiff.

ROACH v. BURGESS.

There can be no set-off against avowry for rent.

REPLEVIN. Issue upon the plea of nothing in arrear.

The premises belonged to Burgess in common with the other heirs of Crawford. The demise to the plaintiff was by Burgess alone.

The plaintiff offered to prove accounts for money paid to some of the other heirs, as payments on account of rent.

Mr. Marbury, for the defendant, objected; and contended that there can be no set-off for avowry for rent; and if there could be, it is not pleaded, and no notice has been given. It cannot be given in evidence as payment, unless agreed to be received as payment; and there is no evidence of such an agreement. 4 Starkie, 1312; *Sapsford v. Fletcher*, 4 T. R. 512; *Prior v. Jacocks*, 1 Johns. Ca. 169.

Mr. R. P. Dunlop, contra. The defendant has admitted similar accounts in payment. That is sufficient evidence to be left to the jury, as evidence of such an agreement.

Mr. Coxe, in reply. The plaintiff has suits now depending in this Court, (Nos. 117, 118, 119,) for these very items. The only witness who proves the items which were admitted by Burgess, says that he does not know of any agreement to admit the others. No such items are charged by Burgess to the other heirs.

The COURT (CRANCH, C. J., doubting,) refused to admit the subsequent payments made by the plaintiff to the other heirs.

CRANCH, C. J., was of opinion that the allowance by Mr. Burgess of similar payments to other heirs, was evidence, admissible to the jury, that Burgess had agreed to allow these.

But THRUSTON, J., thinking the evidence was not sufficient to be left to the jury, (and there was no other evidence of such an agreement,) the evidence of the payment to the other heirs was not submitted to the jury.

Verdict for defendant.

NEGRO FREDERICK BOWMAN v. HENRY BARRON.

A Virginia slave of a Virginia owner, was loaned by the widow to her son-in-law in Washington, D. C., until the estate should be settled and distribution made. The slave resided in Washington, under that loan, more than a year, and was then sent back to Virginia, and upon settlement of the estate was assigned to one of the distributees.

Held, that the slave did not thereby acquire a right to freedom under the Maryland Act of 1796, c. 67. Although the administrator, who was neither party nor privy to the lending, afterwards knew of it and did not object.

PETITION FOR FREEDOM. *Mr. Key*, for the petitioner, contended, that a residence of the slave, in Washington, was evidence of an importation with intent to reside; which gives freedom under the first section of the Maryland Act of 1796, c. 67; and cited the case of *Negro William Green v. Jewett*, in this Court in May, 1832.

Mr. Bryce and *Mr. Jones*, *contrà*. Although the residence was indefinite, it was in its nature temporary. It was intended to continue only until the estate should be settled. The act requires that the intended residence should be permanent. *Negro Louisa Johnson v. Milo Mason*, in this Court in 1828. [3 Cranch, C. C. 294.]

Upon the prayer of *Mr. Jones*, for the defendant,

The COURT (THRUSTON, J., doubting,) gave the following instruction to the jury, namely: If the jury find from the evidence that the sending of the petitioner from Virginia to Washington was in consequence of a lending by the widow Barron to her son-in-law H. Gassaway; that the loan was temporary in its nature, though for an indefinite period, which might determine within the year, or not for two or three years; that the administrator, the defendant, was no party to such lending, nor any way privy to the same, though he afterwards knew of it, and did not object; that the petitioner was sent back to Virginia about last Christmas, to abide the final distribution of the estate; and that such return of the petitioner to Virginia was pursuant to the original intent of such lending; (evidence tending to prove which was given by the defendant,) that upon such return of the petitioner to Virginia, he was included in the distribution of the personal estate of the intestate, and, in course of such distribution, was allotted and distributed to Ann C. Barron, one of the children of the intestate; after which he, of his own accord, without the knowledge or consent of the owner, left Virginia, came back to Washington, and there filed his said petition: Then the petitioner is not entitled to his freedom, though it turned out that the petitioner was kept in Washington, under the said lending, two or three years.

Verdict for the defendant.

MILLER AND MACKAY v. FRINK HUBBARD *et al.* and CHESAPEAKE AND OHIO CANAL, Garnishees.

If a contract with the Chesapeake and Ohio Canal Company be declared by them "abandoned" for non-compliance with the terms thereof, according to a right reserved to the company by the contract, the contractors do not thereby forfeit the money which they have earned, up to the time of the abandonment, except the 20 per cent. reserved as security for the execution of the work contracted for; although by the terms of the contract, upon the contract being declared "abandoned," it was agreed that "the company should be exonerated from every obligation thence arising; and that the reserved per centage on the contract price should become the property of the company to indemnify them for such breach of contract."

The attaching creditor is not in a better condition than his debtor would have been in if the attachment had not been laid.

A draft by the defendant upon the garnishee, in favor of a third person, before the attachment, is an assignment to the payee of the amount stated in the draft, and will be preferred to an attachment.

THIS was an attachment of money in the hands of the Chesapeake and Ohio Canal Company, due to the defendants, who were contractors to perform certain work upon the canal, and who were indebted to the plaintiffs. Before the attachment was laid, the company had declared the contract abandoned, for non-performance of the whole work by the appointed time. Before the attachment the defendants had given to one Rohrback a draft for an amount large enough to cover the whole amount due to them by the company.

Two questions were raised in the cause.

1. Whether the defendants, the contractors, by the abandonment of the contract had not forfeited all the money remaining in the hands of the company.

2. If not, then whether the money, at the time of the attachment, was the money of the defendants, or of Rohrback.

The cause was fully argued by *Mr. Mason* and *Mr. Wallach*, for the plaintiffs; by *Mr. R. S. Coxe*, for the company, and by *Mr. C. Cox*, for Rohrback.

CRANCH, C. J., delivered the opinion of the Court, (THRUSTON, J., absent.)

Attachment under the Maryland Act of 1795, c. 56. The attachment was issued and served on the 19th of February, 1833. The defendants had been contractors for work on the canal, but having failed to comply with the terms of the contract, it had been declared by the president of the company, "abandoned" on the 9th of February, 1833, under a power reserved in the contract to that effect. By the contract, monthly estimates of the quantity and value of the work done, were to be made by an engineer in the employment of the company, at the prices con-

Miller and Mackay v. Hubbard.

tained in the proposals, which were to be final and conclusive, unless objected to before payment thereof, and within twenty days after they should have been returned to the president and directors. Within ten days after such return, not less than four-fifths of the sum appearing to be due for work performed since the preceding estimate, were to be paid; the balance being reserved by the president and directors, to ensure the fulfilment of the contract; no portion of which reserved money was, under any circumstances to be paid until the contract should be fulfilled. It was also agreed, that when the president of the company should have declared the contract abandoned, "the company should thereupon be exonerated from every obligation thence arising; and the reserved percentage on the contract price, should become the property of the company, to indemnify them from such breach of contract."

The following facts were stated and admitted in the argument: That after the contract was declared "abandoned," an estimate was made by the proper officer of the company, of the work done since the preceding estimates, amounting to about \$800; to four-fifths of which the defendants were entitled, unless they had forfeited the same by the abandonment of the contract.

That on the 16th of February, 1833, the defendants drew an order on the company in favor of the plaintiffs, for the amount due by the defendants to the plaintiffs; and also an order on the company in favor of Jacob Rohrback, for \$705.47, "out of any money that may be due to us after a full settlement of our accounts with the said company." That this last mentioned order was delivered to the plaintiffs as the friends of Rohrback, at the same time with the order in favor of the plaintiffs. That the plaintiffs immediately presented to the company for acceptance, the order in their favor; but the company refused to accept it. The plaintiffs did not present the order in favor of Rohrback, although they had it in their possession, nor did they give any notice thereof to the company; but issued the present attachment founded upon the note of the defendants of the 4th of February, 1833.

The following questions were raised in the argument:

1. Whether the defendants, by the abandonment of the contract, had forfeited all the money remaining in the hands of the company.

2. If not, then whether the money (exclusive of the 20 per cent. which was admitted to be forfeited,) was at the time of the attachment, or at any time since, the money of the defendants, or whether it was the money of Rohrback by virtue of the draft, of which the company had not notice until after the attachment was served.

1. Upon the first question, the COURT is of opinion that the defendants, by non-compliance with the contract, forfeited only the reserved 20 per cent., and that all the residue of the estimated value of their work was due to them, or their assignee or assignees.

2. Upon the second question, the opinion of the COURT is, that the attaching creditors are not in a better condition than their debtor would have been in, if the attachment had not been laid; and as they could not, after their draft in favor of Rohrback, which is an assignment to him of so much of his claim as is stated in the draft, have received from the garnishees that amount to their own use; and as it is admitted that the draft was sufficiently large to cover the whole amount due by the garnishees to the defendants, there was no money of the defendants in the hands of the garnishees, at the time of the attachment. It is true, that if the garnishees had paid the money to the defendants, after the draft in favor of Rohrback, and before the garnishees had notice of that draft, they would have been discharged; but that would only affect the right of property as between Rohrback and the defendants. They would have received it in trust for him, and he might recover it from them by an action for money had and received to his use. But the garnishees, having received notice of that draft, before they paid over the money to the defendants, are bound by that notice; although in their contract with the defendants they expressly state that, "no draft will be accepted by the president and directors, from any contractor." This clause only relates to voluntary acceptance, and cannot affect the legal obligations of the parties, independent of acceptance.

It is said that the plaintiffs also had a draft from the defendants on the garnishees for the amount of the note upon which the attachment is founded, and given simultaneously with the draft in favor of Rohrback, and that, therefore, the plaintiffs ought to share the fund with him in the proportion of their respective claims.

But the Court can make no such order in this case, even if such were the rights of the parties; for this attachment can only affect the property of the defendants in the hands of the garnishees, at the time of the service of the writ, or since; and if they had no property in the hands of the garnishees at that time, or since, the attachment must be quashed, and the contending parties left to their legal or equitable remedies.

That a previous assignment of a debt, by the defendant, will be preferred to an attachment, appears by the following authorities: Sergeant on Attachment, 80; *Privilegia Londini*, 3d edit., p. 277; *Levis v. Wallis*, T. Jones, 222; *Walker v. Gibbs*, 2 Dall.

 Pierson v. Elgar and Ennis.

211; *Stevenson v. Pemberton*, 1 Dall. 3; *Sharpless v. Welsh et al.* 4 Dall. 279; *United States v. Vaughan*, 3 Bin. 394; *Caldwell v. Vance et al.* cited in 3 Bin. 400; *Bank of North America v. McCall*, 3 Bin. 338; *King v. Gorsline*, in this Court, May term, 1831. (*Ante*, 150.)

As the attachment must be quashed, it is not necessary that the Court should notice the objections made by the counsel of Rohrbach, that the affidavit did not state that Miller, one of the plaintiffs, was a citizen of Maryland; and that the word defendant was, by mistake, used for deponent.

Attachment quashed.

 JOSEPH G. PIERSON v. JOSEPH ELGAR AND G. ENNIS.

Notley Young, at the time of his death, had, and the complainant claiming under him had, a right to the water privilege attached to his mill in the city of Washington; but the complainant lost it by rebuilding the mill on a new site; and by cutting a new race, taking the water out higher up, the right of the public to the streets having intervened before the rebuilding and change of location of the mill. No prescription runs against a public right, nor is the possession and use for twenty years, evidence of a grant from the United States.

The Court will not grant an injunction to prevent the water from being diverted from its natural course, unless serious damage, actually incurred or impending, be shown; but the party complaining will be left to his remedy at law.

MOTION to dissolve an injunction which had been granted by the chief judge, out of court, to prevent the defendant, Elgar, the commissioner of the public buildings, from laying water pipes through the complainant's lots in the city of Washington, and to prevent him from taking water, for the capitol, from a spring which supplied water to the complainant's mill in Washington.

The cause was argued by *Mr. Jones* and *Mr. R. S. Coxe*, for the complainant, and by *Mr. Key*, for the defendants.

The COURT (MORSELL, J., not sitting in the cause,) dissolved the injunction.

CRANCH, C. J., after stating the substance of the bill and answers, the original deeds of trust, the proceedings of the commissioners, and the Act of Maryland of 1791, c. 45, and the arguments of the counsel, said:

I am, therefore, of opinion, that Mr. Young, at the time of his death, had, and those claiming under him, have, a right to the water privilege attached to the mill, and that they cannot be deprived thereof, for the benefit of the public, without just compensation.

This opinion, however, applies to the mill as it was on the 18th of November, 1796, when it was allotted to Mr. Young by the commissioners, and when he became seized of, and held the same

in his former estate and interest. It is still to be considered whether it applies to the present mill and the new race. If the new mill had been erected on the old site, and the old race had remained, it would have been entitled to the old water right, as appears by *Zuttrell's case*, 4 Co. 86.

It is admitted by the complainant, in his bill, that immediately after his purchase of the mill from Mrs. Casanave, which was in May, 1811, he commenced, and in the following year completed, extensive alterations in the mill and its appendages. That he rebuilt the mill, which was removed from about ten to twenty feet above its former site; and at the same time cut a new race, taking the water out of the eastern branch of the Tiber, higher up than before.

By thus abandoning the old site of the mill, and the old race, and taking the water out of the Tiber at a different place, it seems to me that the complainant has lost the prescriptive right to the water which he held under Mr. Young; and if he has now any right to conduct the water to his present mill, it must depend upon his ownership of the land contiguous to the Tiber, below the place where he takes the water out of its natural channel, and of the land through which the race passes, or upon actual or presumed grants from the owners of such land.

The complainant has not shown himself to be the owner of all the land through which the Tiber passes between the place where the mill water is taken out, and the place where it is returned into the Tiber; nor of the whole of the land through which the race passes; nor has he shown actual grants from the owners of such land.

But he relies upon the presumption of such a grant arising from twenty years uninterrupted occupation and use of the water without objection or complaint.

This use and occupation began in 1811 or 1812, long after the ground, through which the new race runs, was laid out into a city with streets, lots, squares, and parcels, and after they were marked and bounded on the land itself. The public had acquired rights against which no prescription could run. (2 Roll. Ab. 265, Prescription E.) By the common law, the rule is "*nullum tempus occurrit regi*," as to all public rights; and the reason of the rule was the presumption that the king is daily employed in the weighty affairs of the government, and cannot always be on the watch, to guard the public interests at all points. Hence the rule "*vigilantibus, non dormientibus jura subveniunt*," does not apply to him. (Hob. 347.) And as the rule of evidence which presumes a grant after twenty years uninterrupted enjoyment of an incorporeal hereditament is founded upon the presumed acqui-

escence of him whose right would be abridged by such enjoyment if the occupant had no grant, and who had notice of such occupancy, with the legal ability to prevent it; the rule cannot apply to him who is not bound or not able to watch his rights, or redress his wrongs. Hence it is that there can be no occupant against the king. (Co. Lit. 41 *b*). That no presumption of a grant arises against a reversioner, by twenty years occupancy as against the tenant for life; or in the case of glebe lands, where occupation, as against the incumbent, cannot affect the right of his successor.

In the present case, the public, having had a right to the streets before the complainant constructed his present mill and race, his use and occupation, for twenty years, is no evidence of a grant of right to conduct the water through, over, or across the streets; and if he has no such right and cannot bring the water to his mill without crossing a public street, he can have no right to an injunction to prevent the public from using the water which he has no right to bring to his mill.

But the complainant also claims a right to an injunction to prevent the abstraction of the water from the spring, because he is the proprietor of city lots through which the water of the spring flows in its natural course. Whatever his right to the natural flow of the water may be in consequence of his ownership of some of the city lots through which it would naturally flow; and whatever may be his right of action at law for the abstraction of a portion of that water, without showing actual damage thereby, yet, in order to justify an injunction there must be shown serious damage either incurred or impending. No such damage having been averred as resulting or apprehended from the mere abstraction of a portion of the water, so far as the complainant's proprietary right to a part of the natural bed of the stream is affected, the complainant must be left to his remedy at law.

Another ground of complaint is that the defendants either had laid or were about to lay, water pipes through the land of the complainant without his authority.

It does not appear by the bill whether the pipes were actually laid, at the time of filing the bill; but it appears, by the answer of Mr. Noland, the successor of Mr. Elgar, (if it is to be received as an answer,) that the whole work was completed before the bill was filed; and by the answer of Mr. Ennis that it was completed before the injunction was served. But whether the pipes were laid, or not, before the service of the injunction, if that had been the only cause of complaint it would hardly have supported an injunction as the actual injury by laying the pipes through the complainant's land, could not be very great, and certainly might be compensated in damages by an action at law.

This ground alone does not seem sufficient to sustain the injunction.

The injunction is dissolved. And the cause being, by consent, set for final hearing on the bill, answers, and exhibits, the bill is dismissed.

THRUSTON, J., concurred in the decree dismissing the bill.

MORSELL, J., did not sit in the cause.

NEGRO JOS. CRAWFORD v. ROBERT A. SLYE.

The list of slaves required by the eleventh section of the Maryland act of 1796, c. 67, must designate the sex. The name "Jo," does not designate the sex.

PETITION FOR FREEDOM. The importation of the slave (the petitioner) was alleged to be justified under the 11th section of the Act of Maryland, 1796, c. 67, which requires a list of the slaves so imported, distinguishing their sex. The list merely calls the slave "Jo."

The COURT (THRUSTON, J., absent,) decided that the list required by the 11th section must be such as is required by the 8th, and must designate the sex as well as the name; and that the list offered does not designate the sex; and that therefore the petitioner is entitled to freedom.

Mr. Key and *Mr. Wallach*, for the petitioner.

Messrs. Marbury and *Brent*, for defendant.

KING AND PICKERELL v. W. P. SHAW.

In cases under the lien law, the Court will not oblige the defendant to plead at the return term.

THIS cause stood on the appearance-docket No. 372.

Mr. C. Cox, for the plaintiff, stated that it was a case under the lien law of March 2d, 1833; and moved the Court for a rule on the defendant to plead at this term; because the lien could continue only two years from the commencement of the building, and if the plaintiff should not get judgment within the two years he would lose the lien.

But the COURT (*nem. con.*) refused to grant the rule.

CORPORATION OF WASHINGTON v. FOWLER.

A witness is not incompetent because he feels himself bound in honor to indemnify the party who calls him as a witness, in case the judgment should be against him ; if he has made no promise to indemnify him, nor is bound in law so to do.

DEBT on the auctioneer's bond of Moses Poor ; the defendant being his surety. Judgment having been rendered against Mr. Poor and the defendant having given him a release, the defendant called him as a witness, and upon cross examination he answered that he felt bound in honor to indemnify the defendant if judgment should go against him, but had not promised or in any manner bound himself so to do. Whereupon the plaintiff's counsel objected, and contended that the testimony of Mr. Poor should be rejected as incompetent on account of that honorable feeling.

But the COURT, (*nem. con.*) upon the authority in 4 Stark. 746, overruled the objection. See also *Corporation of Washington v. Webb*, at November term, 1834, S. P. (not reported.)

ROBERT OLIVER v. SUSAN DECATUR.

In a suit in equity to foreclose a legal mortgage, the Court will not, before answer, grant an injunction to prevent the mortgagor in possession from receiving the rents and profits ; nor will they appoint a receiver, the defendant being in no default for not answering.

The defendant may, at any time, before the bill is taken for confessed, plead, demur, or answer ; and the plaintiff is to pursue the same course as if the plea, demurrer, or answer had been filed before the expiration of the three months limited, for answer, by the rules of the Court.

BILL to foreclose a legal mortgage, and for an injunction to prevent the defendant from receiving the rents, and praying that a receiver may be appointed ; on the suggestion that the property is insufficient security for the debt.

The defendant was in no default for not answering.

Mr. Key and Mr. Dunlop, for the plaintiff, moved the Court to appoint a receiver, and cited 2 Maddox, 231, 233, 235 ; *Wills v. Pugh*, 10 Ves. 403 ; *Middleton v. Dodswell*, 13 Ves. 266 ; *Lloyd v. Catlin*, 16 Ves. and the cases cited in 2 Maddocks, 231, and *Duckworth v. Trafford*, 18 Ves. 283 ; *Barney v. Sewell*, Jacobs & Walker, 629.

Mr. Marbury, for the defendant, cited 2 Mad. 231 ; Cooper's Chancery, 42, 107 ; *Barney v. Sewell*, Jacobs & Walker, 629, to show that it is not usual to appoint a receiver before answer ; nor in a case of legal mortgage.

The COURT (*nem. con.*) refused to grant an injunction and to appoint a receiver.

In November, 1833, the defendant pleaded the pendency of another suit for the same cause in Norfolk, (Virginia,) but afterwards, and before the plea was set down for argument, namely, on the 29th of March, 1834, withdrew the plea and filed an answer, which the plaintiff's counsel contended was wholly insufficient and ought not to be received, and must be considered as a nullity, and again moved the Court to appoint a receiver.

Mr. Dunlop, for the plaintiff, cited *Dillon v. Alvares*, 4 Ves. 357, that the pendency of a suit in Ireland is no bar to an injunction; *Avery and Woodcock v. Petten*, 7 Johns. Ch. R. 211; *Verplank v. Caines*, 1 Johns. Ch. R. 57, as to power to appoint a receiver.

Mr. Marbury, *contra*, cited *Barney v. Sewell*, 1 Jac. & Walker, 629. The defendant has a right to answer at any time before the bill is taken for confessed; which is not yet done. If the answer is not sufficient in some respects, the plaintiff must except to it. It cannot be treated as a nullity.

CRANCH, C. J., delivered the opinion of the Court, (MORSELL, J., absent.)

This is a bill to foreclose a mortgage in fee, and for the appointment of a receiver; and for an injunction to prevent the mortgagor in possession from receiving the rents, and the tenants from paying them to her.

The bill was filed on the 22d of March, 1833. On the 28th of November, 1833, the bill not having been taken for confessed, the defendant filed a plea of a prior suit for the same cause still depending in a court of equity in Norfolk, in Virginia.

On the 29th of March, 1834, the plea not having been set down for argument, the defendant withdrew it, and filed her answer.

On the 1st of April, 1834, the plaintiff again moved for a receiver and injunction on the ground of the insufficiency of the answer, which he avers the defendant had no right to file, unless by leave of the Court; and contends that the Court should consider a bad answer as no answer; and should now take the bill for confessed, and proceed to decree.

By the 6th rule of practice prescribed by the Supreme Court of the United States, the defendant has three months, after the appearance day, to answer; and, by the 10th rule, if he does not answer by that time, the plaintiff may take the bill for confessed, or have a general commission or attachment to answer interrogatories; but the Court may permit an answer. By the 18th rule, the defendant may, before the bill taken for confessed, demur, or plead to the whole bill or to part of it, and answer to the residue; and, by the 20th rule, if the plea or demurrer be overruled, the defendant has two months to answer; and, if his answer be insufficient, the plaintiff, by the 13th rule, may, in two

months, except; and, by the 14th rule, the defendant has two months to file a better answer, or to insist on the sufficiency of that which is already filed. If he insists, the plaintiff may set down the exceptions for argument at the next term. If the answer be adjudged insufficient, the defendant must put in a better, &c.

Thus, it seems, that, at any time before the bill is taken for confessed, the defendant may plead, demur, or answer, as he may think fit, and the plaintiff is to pursue the same course as if the plea, demurrer, or answer had been filed before the expiration of the three months limited for answer. So that it does not yet appear that the defendant is in default. But, if she were, the plaintiff could only get a decree *nisi*, according to the 6th rule; and that decree could not be for a receiver or an injunction. No case has been shown in which a receiver has been appointed in favor of a legal mortgagee, against the mortgagor in possession; and the case of *Barney v. Sewell*, in 1 Jac. and Walker, 629, seems decisive that it cannot be done consistently with the rules of a court of equity in England; and it is upon the English cases, and the cases in this country, which have been decided upon English cases, that the appointment of a receiver is now claimed.

The plaintiff, in this case, has not used due legal diligence. The mortgage became absolute, or, by proper demand, might have become absolute, on the 14th of June, 1829. The bill was not filed until the 22d of March, 1833; and the plaintiff has brought no action of ejectment to obtain possession, and cannot recover, at law or in equity, the rents received by the mortgagor in possession.

The COURT has already decided that the facts stated in the bill do not entitle the plaintiff to have a receiver or an injunction; and nothing has occurred since, to give him a right to claim either.

We think, therefore, that the motion must be overruled.

This cause came on again, to be argued upon the exceptions to the answer, on the 26th of November, 1834, and was argued by *Messrs. Key and Dunlop*, for the plaintiff, and *Mr. Marbury*, for the defendant.

The plaintiff's counsel still insisted that the answer was so imperfect that the Court must consider it a nullity, and should take the bill for confessed, and appoint a receiver.

CRANCH, C. J., after reciting the thirteen exceptions taken by the plaintiff, to the defendant's answer, said:

Upon a careful reading of the bill and answer, I think the answer is exceptionable in every particular in regard to which it is excepted to; but still I cannot consider it as a nullity. It

answers some of the material allegations of the bill, and insists, by way of plea and demurrer, that the complainant is not entitled to relief or discovery, as to some of the other grounds of complaint. But it is certainly an insufficient answer.

The question then occurs, what is the order to which the complainant is now entitled, according to the rules of practice in a court of equity?

By the 14th rule prescribed by the Supreme Court of the United States, for the circuit courts, the defendant, having insisted on the sufficiency of his answer, and the exceptions having been set for argument, and argued, the Court cannot receive any further or other answer, "but on payment of costs."

By the 15th rule, the costs thus to be paid are to be "such costs as shall be allowed by the Court."

By the 16th rule, upon a second answer being adjudged insufficient, costs shall be doubled, and the defendant may be examined upon interrogatories, &c., or the plaintiff may move the court to take so much of the bill as is not answered, for confessed, and proceed for the residue, in the ordinary mode, by replication, commission, and hearing.

The order of the Court is, that the plaintiff's bill shall be taken for confessed, unless the defendant, on or before the 15th day of this month of December, 1834, answer fully as to all the particulars in regard to which her former answer was excepted to by the plaintiff, and pay to the plaintiff the full legal costs by him expended in this suit, up to that day.

(See 2 Mad. Ch. Pr. 343; *Tomkin v. Lethbridge*, 9 Ves. 178, 463; and *Smith v. Serle*, 14 Id. 415, as to what answer will be deemed illusive and a nullity.)

The COURT again refused to appoint a receiver.

ROBERT OLIVER v. SUSAN DECATUR.

If the interest is, by the agreement, payable annually, it is not usury to add it to the principal, at the end of the year, and take a new note for the whole, bearing interest.

ASSUMPSIT, against the maker of a promissory note.

*Mr. Marbury*¹ and *Mr. R. S. Coxe*, for the defendant, prayed the Court to instruct the jury, in effect, that, if they should be satisfied, by the evidence, that the plaintiff loaned to the defend-

¹ *Mr. Marbury* cited Comyn on Usury, 82, § 7-14; Noy, 71; 3 B. & P. 154; 9 Ves. 223; 6 Johns. Ch. Rep. 313.

Ex parte Kennedy and Devlin.

ant, on the 3d of November, 1820, the sum of \$3,000, and on the 22d of December, 1820, the further sum of \$12,000, and on the 26th of June, 1822, the further sum of \$8,000, and that, at the times of the loans, respectively, it was agreed between the said parties, that the interest thereon should be paid annually, according to the respective dates of the said loans; and that, afterwards, the plaintiff calculated the interest of the said loan of \$3,000, from the 3d of November, 1820, to the 31st of December, 1821; and on the said loan of \$12,000, from the 22d of December, 1820, to the 31st of December, 1821; and afterwards calculated interest upon the said interest from the 31st of December, 1821, to the 31st of December, 1822; and that the promissory note of the defendant, upon which this suit is brought, was given for, and included, the interest upon the interest, so calculated, and also the interest upon the said loan of \$8,000, so calculated as aforesaid, then the said note is usurious, and the plaintiff cannot recover thereupon in this action.

But the COURT (THRUSTON, J., *contrà*,) refused to give the instruction.

Mr. Key cited *Peter v. Brackenridge*, in this Court, May, 1830; *Bank of Washington v. Eliot*; *Anstruther*, 495, and 1 Johns. Ch. Rep. 14.

(See *Comyn on Usury*, 87, 147; 1 *Bulstrode*, 17; 2 *Salk*. 449; 1 Ch. Ca. 258; *Brown v. Barkham*, 1 P. W. 652; *Thornhill v. Evans*, 1 Atk. 330; *Morgan v. Mather*, 2 Ves. Jr. 15; *Waring v. Cunliffe*, 1 Id. 99.)

Verdict for plaintiff, \$7,558.

Ex parte KENNEDY AND DEVLIN.

An execution against two only, upon a judgment against three, without a suggestion of the death of one, is void, on its face.

THE return upon the *habeas corpora*, was, that the prisoners were held upon writs of *ca. sa.* which stated the judgment to be against the prisoners and one Hugh Tierney, and required the officer to take the two prisoners only, without suggesting the death of Hugh Tierney.

Mr. Hoban and *Mr. Cox*e, for the prisoners. *Mr. Z. C. Lee* and *Mr. Dunlop*, *contrà*.

The COURT (THRUSTON, J., absent,) discharged the prisoners, being of opinion that the execution against two only, upon a judgment against three, without a suggestion of the death of one, was void on its face. See *Tidd*, 1029; *Bac. Ab. Exon. G. 1*; 2 *Evans's Harris*. 115, 303.

Negress Keziah v. Slye.

NEGRESS KEZIAH v. THOMAS G. SLYE.

A slave imported into the county of Washington, from Virginia, under the 11th section of the Maryland Act of 1796, c. 67, is entitled to freedom, unless recorded within three months thereafter.

THE petitioner belonged to the defendant's wife, and was brought from Virginia to Washington, under the 11th section of the Maryland Act of 1796, c. 67, but was not recorded within thirty days thereafter, as required by the statute.

Mr. Wallach, for the petitioner.

Mr. Marbury, for the defendant, contended that the omission was not with any fraudulent intent.

But the COURT (*nem. con.*) was of opinion that the neglect was fatal.

Verdict for the petitioner.

CIRCUIT COURT OF THE UNITED STATES.

MAY TERM, 1834, AT ALEXANDRIA.

UNITED STATES *v.* HENRY LLOYD.

The want of a prosecutor's name upon the indictment is no ground for arresting the judgment.

ASSAULT AND BATTERY. Verdict for United States.

Mr. Hewitt, for the defendant, moved in arrest of judgment, that no prosecutor's name had been written upon the indictment before it was sent to the grand jury, as required by the Act of Assembly of Virginia of November 13, 1792, p. 105, §§ 23, 24; and contended that the Court would have quashed the indictment upon motion before trial. That there was no difference in principle between a motion to quash, and a motion to arrest the judgment. If there was good ground to quash, there was, *a fortiori* good ground to arrest. 4 Bl. Com. 375; 1 Chitty, Cr. L. 661, 663, 664. The new statute of Jeofails of Virginia of 1819, was passed before the case of *Commonwealth v. Chalmers*, 2 Virginia Cases, 76, 77. See Leigh's Compilation of Virginia statutes, p. 611.

Mr. Key, contra. Nothing appears upon the face of the indictment to arrest the judgment. The case of the *Commonwealth v. Chalmers*, 2 Virginia Cases, 76, 77, is decisive. See also *Wortham's case*, 5 Rand. 669.

The COURT overruled the motion, (THRUSTON, J., not giving any opinion.) The Court did not state the reasons for their decision; but the grounds were, that the provision of the statutes requiring the name of a prosecutor to be written on the indictment, was for the benefit of the defendant, that he might have security for costs, and to prevent unnecessary expense to the United States. If the defendant goes to trial without such security, he must be considered as having waived the benefit; and the United States have already incurred the expense.

RICHARD TURNER'S EXECUTORS v. GEORGE WHITE.

A single bill may be declared upon according to its legal effect.

Upon the plea of "payment," it is not necessary to produce in evidence the single bill.

The plea admits its execution, and that it is truly stated in the declaration.

DEBT on a single bill, in the following words: "On demand we bind ourselves, our heirs, &c., to pay to Richard Turner, his heirs, &c., \$651. Witness our hands and seals," &c. "George White, [SEAL.]"

The declaration was in the name of John Pratt, and John Pratt, junior, executors of Richard Turner with a profert of the letters testamentary, by which it appeared that a certificate was "granted to John Pratt, senior, and John Pratt, junior, for obtaining a probate" of the will, "in due form."

Mr. Hewitt, for the defendant, objected that the letters testamentary did not support the averment that John Pratt, and John Pratt, junior, were executors of Richard Turner.

The COURT (*THRUSTON, J., contra*,) overruled the objection.

Mr. Hewitt then objected to the admission of the single bill in evidence to support the averment that the defendant "acknowledged himself to be bound" to the plaintiff's testator in the sum of \$651.

But the COURT (*nem. con.*) overruled the objection; being of opinion that the single bill was well set out according to its legal effect.

And CRANCH, C. J., said, that on an issue upon the plea of payment, it is not necessary for the plaintiff to produce the single bill in evidence; as the plea admits its execution, and that it is such an instrument as is averred in the declaration, or appears on *oyer*.

UNITED STATES v. JOHN FARRING.

A *nolle prosequi*, without the consent of the defendant, after the jury has been sworn, is equivalent to an acquittal, and may be so pleaded.

INDICTMENT FOR LARCENY.

The defendant had been indicted at this term for stealing two silver dollars, and an order drawn by Hoffman and Stephenson on for \$15.

Upon the trial, the order, produced in evidence, was drawn by Hoffmans and Stephenson.

Mr. Key, Attorney for the United States, thereupon directed

the clerk to enter a *nolle prosequi*, and the jury was discharged without the consent of the defendant, and a new indictment was found by the grand jury, reciting the order truly. A verdict of guilty was found upon this second indictment, subject to the effect of the *nolle prosequi* and discharge of the jury, as if specially pleaded.

Motion in arrest of judgment for that cause.

Mr. Taylor, for the defendant. It is only in cases of inevitable necessity that a jury can be discharged without the consent of the defendant. *Wedderburn's case*, Foster, 22, g; 1 Chitty, Cr. L. 630.

Mr. Key, *contrà*. It is now brought to a reasonable rule. Wherever it is for the benefit of, or is indifferent to the prisoner, the jury may be discharged without his consent, as in the case of the sudden illness of a juror or witness, or where a witness is kept out of the way by the prisoner, or other accident.

A mistake of a single letter in an indictment is an accident, like the illness of a witness or juror. 1 Chitty, 631, note; 2 Johns. Ca. 275, 301; 2 Cain. 100, 304; *Cogan's case*, Leach, 167. But this is not an indictment for the same offence. The order could not have been given in evidence upon the former indictment.

The COURT (THRUSTON, J., *contrà*,) arrested the judgment, being of opinion that the discharge of the jury without the defendant's consent, was equivalent to an acquittal as to the dollars, and that the defendant might have pleaded it with an averment that the stealing of the dollars and of the order was one act of taking, if such an averment be necessary; which is doubtful, as the indictment charges it to be one act of theft; and upon a general verdict of guilty he would have been sentenced to the penitentiary.

NEGRESS KITTY LEMON v. EBENEZER BACON.

An absolute deed of goods and chattels need not be recorded; and a record copy is not evidence.

ACTION FOR FREEDOM.

Mr. Key and *Mr. Hodgson*, for the plaintiff, offered in evidence the record of a deed of personal property.

Mr. Taylor, for the defendant, objected that a record copy of an absolute deed of goods and chattels, for valuable consideration, need not be recorded, and derives no validity therefrom; and a record copy is not evidence.

And such was the opinion of the COURT (*nem. con.*)
(See statute of Frauds of Virginia, p. 16.)

UNITED STATES v. HENRY LLOYD.

A motion to quash an indictment for want of the name of a prosecutor, is too late after verdict.

The Court will not quash the indictment for want of the name of a prosecutor if the witnesses were called for by the grand jury; but will quash an indictment where the name of a prosecutor was not indorsed, and no order of court to send the witnesses to the grand jury, and it does not appear that the witnesses were called for by the grand jury.

ASSAULT AND BATTERY. In *Turley's case*, in this Court, at November term, 1833, the Court was of opinion that the objection, for want of a prosecutor, was too late after verdict; but agreed to hear *Mr. Hewitt* again in *H. Lloyd's cases*, on that point. It does not appear, however, that in these causes any thing further has been said upon it. The doctrine in *Turley's case*, may, therefore, be considered as conceded.

Mr. Hewitt moved to quash this indictment. The proceedings respecting the witnesses appeared to be as follows:

On the second day of the term the witnesses were called upon by the grand jury and sworn. It appeared by the defendant's recognizance, returned by the justice, that certain persons were witnesses. Their names were indorsed on the indictment by the grand jury, who certify by their foreman, that they were called on by the grand jury. (See the Virginia Law, pp. 105, 346.)

Mr. Hewitt contended, that the Act of 1795, p. 346, § 2, applies only to cases where the fact is known to some of the grand jurors of their own knowledge, and not of the information of others.

The COURT (THRUSTON, J., *contra*,) refused to quash the indictment, where the witnesses appeared to have been called upon by the grand jury.

But (*nem. con.*) quashed another, where there was no prosecutor indorsed, and no order of the court to send the witnesses to the grand jury; and it did not appear that the grand jury had called for them.

CIRCUIT COURT OF THE UNITED STATES.

OCTOBER TERM, 1834, AT ALEXANDRIA.

UNITED STATES *v.* HENRY LLOYD.

A simple assault and battery on a slave is not an indictable offence. A simple assault upon a slave, even with intent to murder him, is not an offence at common law. There must be a battery, as well as an assault with intent to kill, to bring the case within the Penitentiary Act. The Court refused to quash the indictment without prejudice to a motion in arrest of judgment.

ASSAULT AND BATTERY. The first count was for a simple assault and battery upon a slave. The second count was for assault (not assault and battery) with intent to kill and murder, a negro slave, Harry.

Mr. Brent, in arguing to the jury, contended that the second count is not a good count under the Penitentiary Act, which requires that there should be a battery as well as an assault with intent to kill.

Mr. Key, contra, that it is a good count at common law.

Verdict, guilty on both counts, and amerced by the jury \$20 on the first count.

The COURT (*nem. con.*) was of opinion, that a simple assault and battery on a slave, is not an indictable offence; and that a simple assault upon a slave, even with intent to murder him, is not an offence at law.¹

That the second count was bad under the Penitentiary Act, because it did not charge a battery.

October 18, 1834. A new indictment was this day found by the grand jury against the defendant. The first count was for publicly and cruelly beating Harry, a slave. Second count for assault and battery with intent to murder the slave, Harry.

Mr. Brent, for the defendant, moved to quash the indictment, because, he contended, it was not an offence to assault and beat a slave, even with intent to murder him.

¹ CRANCH, C. J., doubted of this; because the murder of a slave is a felony; and an assault with intent to commit a felony, is a misdemeanor at common law.

 United States v. Lyles.

The COURT (*nem con.*) refused to quash the indictment, without prejudice to a motion in arrest of judgment, if the verdict should be against the defendant.

—◆—

UNITED STATES v. THOMAS W. LYLES.

It is a misdemeanor at common law to persuade, instigate, and incite another to commit an assault and battery.

THE indictment charged that the defendant, "intending to disturb the peace of the United States in the said county, and particularly to cause and procure a certain James Jack, in the peace of God and of the United States then and there being, to be assaulted and beaten, did persuade, instigate, and incite and endeavor to hire and employ a certain Daniel Fowler and a certain Philip Vernon then and there being, to way-lay, assault, and beat the said James Jack then and there being, so that the said James Jack was hindered by the said attempts and endeavors, from going about his ordinary business, and other wrongs to the said James Jack, then and there did, to the great damage of the said James Jack, and against the peace and government of the United States."

Mr. Neale, for the defendant, moved to quash this indictment, because, as he contended, it is no misdemeanor to incite a person to commit a misdemeanor; and such misdemeanor is not charged in the indictment, and, in fact, was not committed.

Mr. Key, for the United States, cited *Rex v. Phillips*, 6 East, 464; 2 Chitty, 235; *Rex v. Higgins*, 2 East, 5.

The COURT (THRUSTON, J., absent,) refused to quash the indictment, without prejudice to a motion in arrest of judgment.

Verdict, guilty, and amerced by the jury \$20.

Mr. Neale, for the defendant, moved in arrest of judgment.

Mr. Key, *contra*, cited 2 Chitty, Cr. L. 50, for the form of the indictment. 3 Bl. Com. 119, 120, and 4 Bl. Com. 149.

The COURT (MORSELL, J., not very clear, and THRUSTON, J., doubting, CRANCH, C. J., not doubting,) was of opinion that it is an indictable offence, overruled the motion in arrest.

(See Chitty's General Practice, Appendix, II., that an attempt to commit a misdemeanor created by statute, is itself a misdemeanor. *Rex v. Butler*, 6 Car. & Payne, 368.)

 Brooks v. Nutt.

UNITED STATES v. RICHARD B. LLOYD.

The owner of a slave who beats him cruelly, and exposes him, so beaten, to public view, is guilty of a misdemeanor at common law.

INDICTMENT for beating his own slave Henry, cruelly, and exposing him, so beaten, to public view.

Verdict guilty, and amerced by the jury \$100.

Mr. Brent, for the defendant, moved in arrest of judgment, because the indictment, as he contended, did not state an indictable offence, and cited *Richard Turner's case*, in 1826, 5 Rand. 178, 678, and *United States v. Brockett*, in this Court, some years ago, (2 Cranch, C. C. 441,) for cruelly beating his own slave.

He also moved for a new trial, on the ground of misdirection by the Court to the jury; and because the verdict was against evidence.

The COURT overruled both motions, and rendered judgment for the amount assessed by the jury.

 UNITED STATES v. NEGRO NATHAN, a Slave.

A slave, convicted of larceny in Alexandria county, is to be sentenced to be burnt in the hand and whipped.

INDICTMENT for stealing a pair of shoes, of the value of one dollar. The prisoner pleaded guilty; and he was sentenced by the Court to be burnt in the hand in open court, and to be whipped with ten stripes. See *United States v. John Clark*, a slave, at November term, 1825, (2 Cranch, C. C. 620.)

 NEGRESS ANN BROOKS v. NUTT, Administrator of Finley.

A colored child, born before her mother's title to freedom has accrued and become complete, is a slave of the person entitled to the service of the mother, at the time of the birth.

ACTION, of assault and battery, for freedom.

The plaintiff's mother, Clara, was the slave of James M. Stewart, and sold by him to Finley, the defendant's intestate, on the 24th of July, 1805, by bill of sale, recorded May 10, 1833, for the term of seven years. Finley bound himself to Stewart to eman-

cipate Clara at the end of the seven years; and Stewart bound himself to Finley then to relinquish his right to Clara.

The plaintiff was born in 1811, before the expiration of the seven years, and the bill of sale and obligation to emancipate Clara, was not recorded until after the plaintiff's birth. Finley emancipated Clara in 1817, but always claimed the plaintiff as his slave, she having been born while her mother was his slave.

On the 3d of June, 1833, Stewart made a deed of emancipation of the plaintiff, (Ann.)

Mr. Taylor, for the defendant. The plaintiff was born the slave of Mr. Finley. Her mother, at the time of the plaintiff's birth, was also his slave. She had then no present vested right to freedom; it depended upon Mr. Finley's complying with his covenant with Mr. Stewart. The plaintiff was the slave of Finley, and not the slave of Stewart, and his deed of emancipation was void. *Thrift v. Hannah*, 2 Leigh, 300; *Maria v. Serbaugh*, 2 Rand. 228; *Scott v. Dodson*, 1 Har. & McH. 160.

Mr. Mason, for the plaintiff, *contra*. Clara had an inchoate right to freedom at the time of the birth of the plaintiff, who, at the time of her birth, partook of the inchoate and contingent right of her mother.

The jury having found the above facts in a special verdict,

The COURT (THRUSTON, J., absent,) was of opinion that the law was for the defendant, and that the plaintiff is a slave.

(See the case of *Negroes Peter and Lewis v. Cureton and Preuss*, (2 Cranch, C. C. 561.)

PEYTON HINES v. PETER HEWITT.

An entry on the minutes of the Orphans' Court in Alexandria, "that Peyton Hines be bound apprentice to Peter Hewitt," does not constitute a lawful binding.

THIS was a petition to be discharged from the service of Peter Hewitt, who claimed the petitioner as his apprentice. There was an entry on the minutes of the Orphans' Court of an order, "that Peyton Hines be bound apprentice to Peter Hewitt." This was the only authority shown by the respondent for holding the petitioner; and it was stated by Mr. Moore, the Register of the Orphans' Court, that it was conformable to the usual practice of that court, and that no indentures were actually executed.

The COURT, (THRUSTON, J., absent,) decided that it was not a lawful binding, and discharged the boy.

(See the case of *Bell v. English*, (ante, 332,) October term, 1833.)

UNITED STATES v. RICHARD B. LLOYD.

Upon an indictment for assault and battery on M. H. with intent to kill him, a verdict "Guilty of an assault by shooting M. H. with intent to kill," is substantially a general verdict of guilty.

An indictment under the Penitentiary Act for assault and battery with intent to kill, need not aver it to be done with malice aforethought, nor with any other evil intent than the intent to kill.

Upon a suggestion that a witness, whose affidavit had been taken in support of a motion for a new trial, was an idiot, the Court required the witness to be brought in and examined in court, but refused to order another witness whose affidavit had also been taken for the same purpose, to be brought in and examined, his affidavit not being impeached.

INDICTMENT for assault and battery on Moses Hepburn, with intent to kill him. Verdict, "guilty of an assault by shooting Moses Hepburn with intent to kill, but not with malice aforethought."

The second count charged that the defendant, &c., at &c., "with force and arms in and upon one Moses Hepburn, in the peace of God and the said United States, did make an assault, and him the said Moses Hepburn, did then and there beat, shoot, and ill treat, with intent him the said Moses, then and there to kill, and other wrongs and injuries then and there did, to the great damage of the said Moses, against the peace and government of the United States, and against the form of the statute in such case provided."

Upon a motion in arrest of judgment, *Mr. W. L. Brent*, for the defendant, objected that the verdict did not find a battery; and that the indictment does not charge the manner of shooting, kind of weapon, kind of shot, &c.; and does not state that the defendant unlawfully assaulted the said Hepburn; and cited 1 Russell, 585. It might have been done in his own defence.

The COURT (*THRUSTON, J., contra*,) was of opinion that the second count, and the verdict thereupon, were sufficient.

THRUSTON, J., thought that the indictment should have charged that the assault and battery was wilful, unlawful, or malicious, and should have set forth the manner of the beating and the weapon, &c.

Upon a subsequent argument, (on the 11th of October, 1834,)

Mr. Brent and *Mr. Fauntleroy*, for the defendant, cited 1 Chitty Cr. Law, 227, 228, 233, 242, 245, 276, 286, 643; and *Mr. Key*, for the United States, cited Chitty, 644.

Per Curiam: "This is substantially a verdict of guilty; for the shooting of a man is, in law, a battery upon that man, and the assault and the intent to kill are expressly found. The statute does not require that the act should be done with malice afore-

 Hellrigle v. Dulany.

thought. The finding, therefore, that it was not done with malice aforethought is an immaterial finding, and is surplusage.

The jury, therefore, have found every thing necessary to constitute the statute offence. We do not think it can be necessary, in an indictment upon this clause of the statute, to aver any other evil intent than the intent to kill, which is expressly averred; for it would be tautology to say that the defendant, with evil intent made an assault and battery on the man with intent to kill him.

In support of a motion by the defendant's counsel, at the last term, he produced the affidavit of a woman named Frances Tattersall. Upon a suggestion that she was an idiot, the COURT (CRANCH, C. J., absent,) required that she should be brought into Court and examined by the judges.

The defendant now offered the affidavit of Francis Lloyd for the same purpose. *Mr. Key*, for the United States, requested that this witness also should be brought in and examined in Court. *Mr. Brent*, for the defendant, objected and said, it was not usual to examine witnesses in Court upon a motion for a new trial.

The COURT (MORSELL, J., *contrà*,) refused to cause the witness to be brought in and examined in court, and granted a new trial upon newly-discovered evidence; and the cause was afterwards transferred to Washington for trial.

HELLRIGLE v. DULANY.

If, in a suit in Alexandria, D. C., the debt be reduced below \$50, by offsets, the plaintiff may have judgment for the sum found by the verdict.

ASSUMPSIT for \$466.25, for work and labor as overseer, gardener, carpenter, &c. Plea, *non assumpsit* and set-off, and account in bar, consisting of cash payments, and cash received for vegetables sold, &c.

Verdict for plaintiff, for \$23.12.

Mr. Neale, for the defendant, moved for a nonsuit, because the damages found are below the jurisdiction of this Court; and cited *Maitland v. McDearman*, 1 Virg. Cases, 131; *Minor v. Goodall*, 3 Call, 393; *Pitts v. Carpenter*, 1 Wils. 19; *Groce v. Fisher*, 3 Id. 48; *Ferguson v. Highley*, 2 Virg. Cases, 255; *Parker v. Elding*, 1 East, 353; *Neff v. Talbot*, 1 Virg. Cases, 140; *Hepburn v. Lewis*, 2 Call, 497; *Newman v. Wood*, 1 Mun. 555; *United States v. McDowell*, 4 Cranch, 316; and the Act of 1823, enlarging the jurisdiction of justices of the peace, § 6, [3 Stat. at Large, 743.]

Mr. Mason and *Mr. Taylor*, for the plaintiff.

Hellrigle v. Dulany.

The COURT, at October term, 1834, at Alexandria, rendered judgment for the plaintiff; after considering the following cases and authorities, viz.: *Goddard v. Davis*, in this Court, at Alexandria, July term, 1801 (1 Cranch, C. C. 33); *Rutter v. Merchant*, at the same term (Id. 36); *McKnight v. Ramsay*, at Alexandria, October, 1801 (Id. 40); *Ridgway v. Pancost*, at Alexandria, April, 1802 (Id. 88); *Curry v. Fletcher*, at Washington, December, 1802 (Id. 113); *Beale v. Voss*, at Washington, July term, 1804 (Id. 179); the Maryland Act of 1729, c. 20, § 5; the British statute of 2 Geo. c. 22, § 13; the Maryland Acts of 1785, c. 4, § 7; 1785, c. 87, § 2; 1791, c. 68, § 9; *Hays v. Bell and Wray*, at Alexandria, July, 1807 (1 Cranch, C. C. 440); *McLaughlin v. Stelle*, at Washington, June, 1808 (Id. 483); *Smith v. Queen*, at Washington, June, 1808 (Id. 483); *Bryan v. Davis*, at Washington, June 1810; *Skinner v. Caffrey*, at Washington, December, 1819 (2 Id. 193); *Casanove v. Darrell and Groverman*, at Alexandria, November, 1823 (Id. 444); *Hooe v. Rees*, at Alexandria, May, 1824; *Burton v. Varnum*, at Washington, December, 1824 (Id. 524); *Davidson v. Burr*, at Washington, December, 1824 (Id. 515); *Pitts v. Carpenter*, 2 Str. 1191.

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1834, AT WASHINGTON.

JANE DOYNE *v.* JOB BARKER.

Bail, in slander, will be required, upon the plaintiff's affidavit that the words were maliciously uttered; that the defendant is a transitory person, and about to leave the District, and that the plaintiff verily believes that she has suffered damages to a certain amount.

Mr. W. L. Brent, for the defendant, offered to appear without special bail. 2 Johns. 100, 203; Brown's Pa. Rep. 233; *Mason v. Gould*, 2 Cain. 47.

The plaintiff's affidavit stated that the defendant maliciously uttered the words in the declaration mentioned; that the defendant is a transitory person, and is about to leave the district; and that she verily believes she has suffered damages to the amount of \$3,000, and that she will recover judgment for that amount.

The words charge her with being a swindler and a cheat, and cheating others. The plaintiff is a milliner.

Mr. Brent contended that the plaintiff must swear positively as to her damages.

Mr. Z. C. Lee, contra. A plaintiff, in slander, cannot swear positively as to damages. Highmore on Bail, 12, 15, 24; Starkie on Slander, 243.

The COURT (*nem. con.*) required bail to the amount of \$700.

ANN BARRETT *v.* McPHERSON.

The binding out of an apprentice by two justices of the peace in Washington county, D. C., is of no effect, unless the parent or parents, if living, approve and indorse the indentures within two months.

THIS was a petition of an apprentice to be discharged. The petitioner was bound by two justices of the peace with the consent of her mother.

United States v. Anderson.

It was contended that the indentures were good under the Act of 1793, because under that act a parent may bind out a child. But that act authorizes a father, only, to bind out his child. It was then contended that this was a good binding out under the Act of 1794, c. 47, by which any child who may be bound by the Orphans' Court, may be bound by two justices of the peace when the Orphans' Court is not in session, provided the indentures be approved and recorded according to the 6th section of the Act of 1793, c. 45; and that the parent, or parents, if living, shall approve and indorse the same within two months thereafter. The indentures were approved by the Orphans' Court in the manner in which they are generally approved; but such approval is never indorsed.

The COURT (THRUSTON, J., absent,) decided that the indentures were void, because not approved and indorsed by the parent within two months after their execution.

 UNITED STATES v. JOHN ANDERSON.

Upon an indictment for forgery, a person interested in setting aside the instrument forged, is not a competent witness to prove the forgery.

INDICTMENT for forging an order in the name of Mr. Dorsey, who was called as a witness for the United States.

Mr. Brent, for the defendant, objects, and contends that no person, interested in setting aside the instrument, is competent as a witness, to prove the forgery. 2 Russell, 374; 4 Starkie, 573, 582, 583. In those States where a contrary doctrine prevails, it is by statute; and in England there is a late statute, 9 Geo. 4, c. 32, permitting such testimony; which statute would have been unnecessary if it could be permitted by the common law. *Ross's case*, 2 Dall. 239; *Keating's case*, 1 Id. 110; 10 Petersdorff, 70.

The COURT (*hesitans*,) rejected the witness.

Mr. Key, for the United States, offered again to examine Mr. Dorsey, upon a collateral question, and contended that he was competent to prove any fact except that the signature is not his. *Rex v. Boston*, 4 East, 582.

The COURT (*nem. con.*) still rejected the testimony of Mr. Dorsey, because he was offered to prove a fact tending to prove the forgery.

See *Porter's case*, in this Court, in 1812, (2 Cranch, C. C. 60,) where Jenkins, the person cheated, was examined as a witness for the prosecution. 2 Hawk. 433; 1 Raym. 396; *Rex v. Whitting*, M'Nally, 105, 124; *Maxwell's case*, in this Court, (1 Cranch,

Brown & Sons v. Decatur.

C. C. 605;) Peake's Ev. 94; *Abrahams v. Bunn*, 4 Burr. 2255; *Smith v. Prager*, 7 T. R. 60; *Bent v. Baker*, 3 Id. 27; *Resp v. Ross*, 2 Dall. 239. See *Hardres*, 331; 1 Salk. 283, 286; Str. 728, 1043; 1 Vent. 49; 2 Hawk. c. 46, §§ 24, 25; Str. 1229; M'Nally, 121; Peake, L. E. 96, 116; 4 Starkie, 770, 771; and the following cases in this Court: *United States v. Suter*, November, 1807; *Bayne's case*, December, 1830; *Brown's case*, December, 1827, (3 Cranch, C. C. 268;) *Bates's case*, April, 1823, 2 Id. 405, and June, 1810; *Moxley's case*, December, 1812. Id. 64.

LENOX'S ADMINISTRATOR v. ARGUELLES.

A *certiorari* will not lie to bring up the proceedings of justices of the peace, under the Maryland statute of 1793, c. 43, against tenants holding over.

Mr. Bryce moved for a *certiorari* to a justice of the peace, to bring up his proceedings against a tenant holding over under the Maryland Act of 1793, c. 43.

Mr. Larned, by special permission, stated, that, by the practice in Maryland, a *certiorari* would be granted in such a case; the proceeding under the statute being considered as a substitute for an action of ejectment.

The COURT, however, (*nem. con.*) was of opinion, "as at present advised," that it has no power to issue a *certiorari* in such a case.

ALEXANDER BROWN & SONS, for the use of Robert Oliver, v. SUSAN DECATUR.

If the obligation of the guarantor has become absolute, and he pays the debt, he cannot maintain an action, in the name of the original creditor, against the original debtor, although, at the time of payment, he took an assignment of the debt, from the creditor.

But if, at the time of such payment and assignment, it was not meant thereby to extinguish the debt, but that the same should be assigned to the guarantor, and the same was so assigned, in consideration of such payment, the guarantor had a right to bring his action in the name of the original creditor, against the original debtor.

ROBERT OLIVER guarantied a debt of \$1,500, due by Mrs. Susan Decatur, to Alexander Brown & Sons, and when his obligation, as guarantor, had become absolute, he paid the money to Brown & Sons, and took an assignment of the debt, and brought this suit in the name of Alexander Brown & Sons, against Mrs. Decatur.

Upon the trial, *Mr. Marbury*, for the defendant, prayed the Court to instruct the jury, that, "if they believe, from the evi-

United States v. Milburn.

dence, that the legal plaintiffs loaned to the defendant \$1,500, by the procurement and on the guaranty of Mr. Oliver, who undertook so to guaranty, at the request of the defendant; and that the said R. Oliver, in consideration of his obligation as such surety, having become absolute, paid the said debt to the said Alexander Brown & Sons, out of his own funds, the said Oliver cannot recover in this action, although he took from the said Browns, at the time of his payment, an assignment of the said claim on the defendant."

Mr. Marbury contended that the debt was extinguished by the payment, and the creditor had nothing to assign, and so nothing passed by the assignment. *Bowie v. Duvall*, 1 Gill & Johns. 175; *Dugan v. United States*, 3 Wheat. 172; *Barnes v. Blackstone*, 2 Har. & Johns. 376; *Turner v. Egerton*, 1 Gill & J. 430; *Hollins, for the use of the N. Y. Ins. Co. v. Barnes*, 3 Har. & Johns. 437; *Stark v. Ches. Ins. Co.* 6 Cranch, 268.

Mr. Key and *Mr. Dunlop*, for the plaintiff. The debt was not extinguished. The case of *Bowie v. Duvall* is universally admitted, by the bar of Maryland, to be incorrect. (See Judge Archer's opinion.) It is every day's practice in Maryland for the surety to pay the money and take an assignment of the debt.

Mr. Marbury, in reply. If Mr. Oliver became surety, at the request of the defendant, and was obliged to pay the money, he had a right of action in his own name. The right of action could not be in both at the same time.

The COURT (*nem. con.*) gave the instruction prayed by *Mr. Marbury*. And further, (*THRUSTON, J., contra*), at the prayer of the plaintiffs, instructed the jury, in substance, that, if they find, from the evidence, that when the amount of the loan was so paid by Oliver, to the Browns, and the assignment was taken, it was not intended thereby to extinguish the debt, but that the same should be assigned by the said Browns to the said Oliver, and was, in consideration of such payment, so assigned, the plaintiffs had a right to bring this action, for the use of the said Oliver, in the manner it is brought.

Verdict for the plaintiff for \$1,500 and interest.

 UNITED STATES v. GEORGE MILBURN.

When the marshal has arrested a person charged with a misdemeanor, he may take him to a justice of the peace, to give bail, by way of recognizance, for his appearance in Court to answer for the offence; and the marshal is not bound to take the bail-bond himself.

A recognizance, thus taken by the justice, is valid.

McKenzie & Co. v. Cowing.

SCIRE FACIAS upon a recognizance taken by a justice of the peace, upon a *capias ad respondendum* for a misdemeanor in keeping a public gaming-house.

Plea, *nul tiel record*, and issue.

Mr. Brent, for the defendant, contended that the recognizance was void. That the marshal had no right to carry the defendant to a justice of the peace to give bail, but should have taken it himself, under the Maryland Act of 1780, c. 10; and that the justice had no authority to take the recognizance.

Mr. Key, for the United States, *contrà*. The act was made for the ease of the sheriff; it is only peremptory as to the amount in which the sheriff is to take the bond, when he takes it, not that he shall take it in all cases. It was to enlarge the power of the sheriff.

The COURT ordered judgment to be entered upon the recognizance, being of opinion that the justice had power to take it.

 UNITED STATES v. WILLIAM T. MASTERS.

Evidence will not be admitted that the witness is a common prostitute, to discredit her testimony. The question must be confined to her general reputation for veracity and whether from his knowledge of that general reputation he would believe her upon oath.

INDICTMENT for assault and battery.

Mr. Brent, for the defendant, offered to prove that the witness for the prosecution, was generally reputed to be a common prostitute, in order to discredit her testimony; and cited 2 Hayw. 300; *Hughes v. Scott*, 3 Marshall, 261; *State v. Murphy*, 14 Mass. Rep. 387.

The COURT (THRUSTON, J., absent,) said that the rule which this Court has adopted, is that laid down by Starkie, and the question must be confined to the general reputation of the witness as to veracity; and whether, from his knowledge of that general reputation, he would believe her upon oath.

 MCKENZIE & Co. v. WILLIAM COWING.

If a clerk embezzle the goods of his employer and convert the same into money and deposit it in a bank to his own credit, injunction will not lie to restrain him from disposing of it, although he has no other property, and is about to quit the district; no debt being positively averred so as to justify a *ne exeat*.

THE bill in this case was filed in Alexandria, and an injunction

was granted by one of the judges, to restrain the Bank of Potomac, and the Bank of the United States at Washington, from paying to the defendant, and to restrain the defendant from receiving or transferring the money deposited therein by the defendant to his credit.

Mr. Semmes and *Mr. Jones*, for the defendant, moved the Court to dissolve the injunction for want of equity in the bill.

By consent the motion was heard at Washington, and was fully argued by *Mr. Semmes*, *Mr. Bradley*, and *Mr. Jones*, for the defendant; and by *Mr. Coxe*, for the plaintiffs.

Mr. Semmes, for the defendant, cited 1 Bl. Com. 152; *Bradby*, 147, 213; *Vernon v. Vawdry*, 2 Atk. 119; *Cox v. Baleman*, 2 Vez. Senior, 19; *Bartlett v. Hodgson*, 1 T. R. 42; 3 Ridg. P. C. 1; *Moses v. McFarlan*, 2 Burr. 1008; *Rhodes v. Cousins*, 6 Rand. 188; *Wiggins v. Armstrong*, 2 Johns. Ch. R. 144, 283; *Chamberlain v. Temple*, 2 Rand. 384; *Miller v. Taylor*, 4 Burr. 2400; *Oxford v. Richardson*, 6 Ves. 695, 707; *Anonymous*, 1 Vern. 120, 127, 276; *Chedworth v. Edwards*, 8 Ves. 46; *Hart v. Ten Eyck*, 2 Johns. Ch. R. 108; *Clifford v. Brook*, 13 Ves. 131; *Webster v. Couch*, 6 Rand. 518; *Wiggins v. Armstrong*, 2 Johns. Ch. R. 145; 1 Co. Lit. (Thomas's Ed.) 527.

Mr. Jones, on the same side, cited 1 Mad. Ch. Pr. 154; *Eden*, 211; *Dickens*, 149; *Degg v. Degg*, 2 P. Wms. 414; *Sowden v. Sowden*, 1 Br. C. C. 582; S. C. 1 Coxe's Cases, 165; *Lechemere v. Carlisle*, 3 P. Wms. 211; *Terry v. Phillips*, 4 Ves. 108; *Id.* 17 Ves. 174; *Pett v. Jackson*, 1 Br. C. C. 51; *Jaques's case*, 1 Johns. Ch. R. 65; *Wallis v. Duffield*, 2 Serg. & R. 521; *Pollard v. Patterson*, 3 Hen. & Mun. 67; *Schmidt v. Detericht*, 1 Edw. Ch. Rep. 119; *Rogers v. Vossburgh*, 4 Johns. Ch. R. 84; *Livingston v. Caine*, 3 Johns. Ch. R. 224; *Chichester v. Vass*, 1 Mun. 98.

Mr. Bradley, same side, cited 1 Leach, 251, 699, 870; 2 Russel, 197, 201, 202; 2 Starkie, 833; *Cox v. Paxton*, 17 Ves. 330; *Eden*, 27; *Cooper*, 276; *Phillips v. Oramond*, 2 Wash. C. C. 445; *Murray v. Milburne*, 2 Johns. Ch. R. 441.

Mr. Coxe, *contra*, cited *Lutterell v. Rinal*, 1 Mod. 183.

CRANCH, C. J., delivered the opinion of the Court (*nem. con.*)

The facts stated in the bill, and which upon the motion to dissolve the injunction for want of equity, are to be taken as true, are, that from 1828 to 1834, the plaintiffs employed the defendant as their clerk, book-keeper, and salesman in the retail dry-goods business at a salary of about \$350 a year, and that, during that time, he clandestinely and fraudulently, and in violation of the trust reposed in him, abstracted and appropriated to his own use, money and effects of the plaintiffs to an amount exceeding \$9,000.

That he has a large amount of money deposited to his credit with the Bank of the United States at Washington, which, to that extent, if so much he has, is the money of the plaintiffs; or has arisen from their property and money so abstracted by the defendant. That the plaintiffs have brought suit at law against him to recover the money and effects so clandestinely taken and appropriated to his own use.

That the defendant is about to remove from the District of Columbia, and that he has no property except the money in bank and two boxes at William Gregory's, the contents of which are unknown.

That the defendant will remove and secrete the money before the determination of the suit at law against him, unless restrained by the Court, &c.; and that the plaintiffs want his answer and discovery in some material points necessary to the prosecution of the suit at law.

This is not stated to be such an equitable debt, nor averred in so positive a manner, as to justify the Court in granting a writ of *ne exeat* if it had been asked for; and it was not asked for, probably, because the counsel of the plaintiffs correctly supposed that if it could be considered as a simple debt, it was recoverable at law, and would be a case for legal bail. If it is not a case for a *ne exeat*, to detain the person of the defendant, upon which alone a court of equity can act, there seems to be as much reason for not detaining the property of the defendant upon which a court of equity cannot act, unless by means of an execution specifically authorized by statute.

The only question remaining is, whether this money is, according to the statement of facts in the bill, to be considered as the money of the plaintiffs.

The bill avers that it is the money of the plaintiffs; or has arisen from their property or money so abstracted, &c.

If the averment had been positive and absolute that it is the plaintiffs' money, there could be no doubt that it might be retained by injunction. The doubt arises from the alternative averment that it has arisen from the plaintiffs' property and money so clandestinely, fraudulently, and in violation of his trust, abstracted and appropriated to his own use.

If the fact be, as suggested by this averment, that this money is the proceeds of the plaintiffs' money abstracted by the defendant and appropriated to his own use, can the Court consider it as specifically the money of the plaintiffs? The plaintiffs themselves did not so consider it or they would not have made the alternative averment; for if, in either case, it be the plaintiffs' money, it was sufficient to have so averred it to be. The question then

occurs, can this Court follow and specifically detain the money that has arisen from the abstracted money of the plaintiffs?

The strongest case which has been cited in favor of the plaintiffs, is that of Lord Chedworth in 8 Ves. 46. In that case, however, the injunction was only to prevent a transfer of stock which had been purchased directly with the plaintiff's money by his agent, who had placed it in his own name instead of that of the plaintiff; and the injunction was only granted until the defendant should, by his answer, distinguish the property of his master which he had mingled with his own; and the Lord Chancellor says, "The case, though new, stands upon a principle that will maintain it only till he informs me what part of this property is not his master's." It is true that the injunction was at first extended to the money at the banker's as well as to the stock; but, a few days afterward the Lord Chancellor varied the order by confining the injunction to the stock.

And in the case of *Cox v. Paxton*, subsequently reported in 17 Ves. 329, "Lord Eldon said he had consulted with Lord Ellenborough, and thought he had gone too far." This is stated in 1 Maddock's Ch. Pr. 155, and in Eden on Injunctions, 211, although it does not appear in the case of *Cox v. Paxton*, as reported in 17 Ves. That case, however, does, in principle, overrule that of Lord Chedworth in 8 Vesey.

In the case of *Cox v. Paxton*, the plaintiff's clerk had embezzled their money by false entries in his accounts of receipts and payments, and laid it out in the purchase of policies of life insurance, which he had delivered to the defendants on account of a debt due by him to them, with notice that they were the produce of the plaintiff's property. This embezzlement was a felony within the 39 Geo. 3, c. 85; but independently of that objection, the Lord Chancellor Eldon said, "You cannot denominate him" (the clerk) "a trustee, in any way; there was no trust to lay out this money upon policies of insurance, nor any obligation except to account. His application of the money in this way could never, even without this act of parliament, have given the plaintiffs a title to these policies of insurance. How, then, are they to be considered the plaintiff's property in the hands of the defendants?" "If this case is to be taken according to the representation of the bill, (as it must be upon this demurrer, but only for the purpose of the argument,) that the defendants, knowing that the plaintiffs' money was laid out in these policies, insist upon holding them, the morality of it is obvious; but that cannot be the foundation of a rule in equity." The demurrer was allowed.

The case of *Rhodes v. Cousins*, cited by the defendant's counsel, from 6 Rand. 188, states the doctrine very strongly, that a

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court of equity cannot control a debtor as to the disposition of his property, until final judgment or decree.

If, therefore, the money in the bank is not the specific money of the plaintiffs, and if the defendant cannot, according to the judgment of Lord Eldon, be denominated a trustee in any way, we do not see that we have any authority to deprive the defendant of the control of it.

If the transaction amounts to a felony, there is no civil remedy. If it be not a felony, it can only be a tort, or a contract, express or implied. If a tort, the remedy is in damages; if it be a contract, the remedy is in debt, or *assumpsit*; if it be a debt, it is as much a debt at law as in equity; and the plaintiffs may have bail at law, if they can make out a proper case.

We think the injunction cannot be supported upon the face of the bill, and that it must, therefore, be dissolved.

Injunction dissolved.

UNITED STATES v. DANIEL JACKSON.

Public cruelty to a cow, and beating her to death in or near a public street in Washington, is an indictable offence at common law, as a public nuisance.

THE indictment averred that the defendant, "unlawfully, wantonly, and cruelly, in the public street in the city of Washington, in the same county, and in a public place in the city of Washington in said county, and near the public streets of said city, and dwellings of the citizens thereof, and in view of the said streets and dwellings and said citizens, in said county, did cruelly with clubs and stones, beat, strike, and grievously wound and kill a certain cow, then and there being, the property of a certain Charles A. Howe, of the value of twenty dollars, to the terror and disturbance of the said citizens, and to the common nuisance of the citizens of said county, to the evil example of all others, and against the peace and government of the United States."

Mr. Morfit, for the defendant, moved the Court to quash the indictment. The Maryland Act of 1809, c. 138, § 4, shows that at common law, cruelty to brutes was not punishable. The Virginia cases are founded upon the peculiar qualities of slavery. 3 Chitty, Cr. L. 1087; 4 Bl. Com. 19.

The COURT (THRUSTON, J., absent,) refused to quash the indictment.

Upon the trial, the defendant's counsel contended that it was necessary to prove that the cow died of that beating.

But the COURT refused to give the instruction; and at the prayer

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of the Attorney of the United States, instructed the jury that the gist of the offence was the public cruelty to the common nuisance, and it was not necessary for the United States to prove that the cow died of the beating.

UNITED STATES v. JOSEPH WOODS.

At the request of the prisoner's counsel, the Court will ask each juror as he comes to be sworn, whether he has formed and delivered any opinion as to the guilt of the prisoner upon the indictment.

In a criminal case the United States must prove, first, that an offence has been committed, and secondly, that it was committed by the prisoner.

On a trial for murder, the declarations of the deceased, not made *in extremis*, or with a settled conviction that he is about to die, cannot be given in evidence.

If one of the witnesses who have been ordered to be taken out of court during the examination of other witnesses, remains in court in violation of the order, the Court will not permit him to be examined.

The Court will not order the United States' witnesses to be sent out of court, after they have been examined, and while the prisoner's witnesses are under examination.

The Court will not receive parol evidence of a conviction of larceny in Maryland, to disqualify a witness. If upon cross-examination he admit the fact, but states that he was pardoned upon condition of leaving the State; these facts only go to his credit. A witness, who after his examination remains in court and hears the testimony of the other witnesses, may be examined again to rebut the defence set up by the prisoner.

If the deceased died of a fever caused by the beating while she was in a weak state of health; and the beating was with malice aforethought, it was murder; if without malice aforethought, it was manslaughter.

On a trial for murder the jury must be kept together at night as well as in the day.

INDICTMENT for the murder of his wife.

At the request of the prisoner's counsel, the Court asked each juror, "whether he had formed and delivered an opinion as to the guilt of the prisoner upon this indictment."

After witnesses had been examined to prove that the prisoner had several times beat and kicked his wife,

Mr. Marbury, for the prisoner, objected to further testimony on that point until proof should have been produced that a felony had been committed.

The COURT (*nem. con.*) said, that the proper order of proof was, first, to prove that a crime had been committed; and secondly, that it was committed by the prisoner.

Mr. Key, Attorney of the United States, assented to this course, and offered to give in evidence the declaration of the deceased, made on the 5th of November, after she had, on that day, expressed her conviction that she would die. She did not die till the 2d of December; and after the 5th of November, appeared to her physician to be convalescent for several days; and he told her he thought she would get well; and she said she hoped she

would. The declarations offered were made between the 5th and 20th of November, when the appearances of convalescence first ceased.

The COURT (*nem. con.*) refused to permit them to be given in evidence; not being satisfied that there was a settled conviction in the mind of the deceased that she was about to die; and that the declarations could not be considered as having been made *in extremis*.

The COURT had, at the request of the prisoner's counsel, ordered the witnesses on the part of the United States to be taken out of court, except the one under examination, so that each witness should be examined separately and out of the hearing of the others.

Mr. Key, offered to examine *Mr. Connelly*.

Mr. Coxe and *Mr. Brent*, for the prisoner, objected, that in violation of the order of the Court, he had been present in court and heard the testimony of the other witnesses. 2 Russell, 624; 4 Stark. 1733; *Attorney-General v. Bulpit*, 9 Price, 4; 1 Crim. Recorder, 123; 1 Phil. on Ev. 258.

The COURT, (*MORSELL, J., contra*,) upon those authorities, rejected the witness.

After this decision of the Court, *Mr. Key* cited *Parker v. McWilliam*, 6 Bing. 683, in the Common Pleas, decided nine years after the Exchequer case of the *Attorney-General v. Bulpit*, in which the judges say there is no such rule in the other courts; but that it is in the discretion of the judge *à priori* whether he will, or will not suffer a witness to be examined, who has been in court and heard the testimony of the other witnesses, in violation of the order of Court.

But the COURT (*MORSELL, J., contra*,) adhered to their opinion rejecting the witness.

CRANCH, C. J., said that the Court did not mean to establish a rule by which every witness who shall violate the order to remain out of court, while other witnesses are under examination, should be rejected as incompetent; but they considered the Court as having a discretion to exclude or admit the witness according to circumstances; and that, according to the circumstances of this case, especially as it is a capital case, if it were only doubtful whether the witness were competent, the Court would exclude him.

Mr. Coxe, for the prisoner, after the attorney of the United States had closed the evidence on his part, prayed the Court to order the witnesses on the part of the United States, to be removed from the court, while the witnesses for the prisoner were under examination. The rule, he contended, included the witnesses on both sides. That the reason of the rule is not merely to

prevent the witnesses from combining to agree in their testimony, but to prevent them from forming a combination to contradict the testimony given on the other side. He cited *Free's case*, in this Court in 1822. *Attorney-General v. Bulpit*, 9 Price, 4, and 2 Russell, 624.

The COURT (*nem. con.*) refused to order the witnesses for the United States to be sent out of court, (after they had been examined,) while the prisoner's witnesses were under examination.

CRANCH, C. J., observed that the prisoner's witnesses had heard the whole evidence on the part of the United States, and it did not seem fair that the United States' witnesses should be excluded, while the prisoner's witnesses were under examination. That if it had been originally asked to exclude all the witnesses on both sides, except the one under examination, it is probable the Court would have granted it.

MORSELL, J., said that it would be proper that the United States' witnesses should be present to hear the witnesses on the other side, for they may deny the truth of their testimony, or assail their credit, and they ought to have an opportunity to support their credit and testimony, if attacked.

Mr. Key, for the United States, offered to examine one Henry Holt.

The counsel for the prisoner, offered to prove, by parol, that Holt had been convicted of larceny in Maryland, and had been sentenced to the penitentiary, and had been banished by the governor; and cited 1 Stark. 144, note; *Clark v. Hall*, 2 Har. & McH. 378; *The State v. Ridgley*, 2 Id. 120; and *Cole's Lessee v. Cole*, 1 Har. & J. 572.

The COURT, however, (*nem. con.*) rejected the parol evidence of the conviction.

Holt was then sworn, and upon cross-examination, admitted the conviction of larceny in Maryland, the sentence and the pardon by the governor, upon condition of his quitting the State.

The prisoner's counsel then prayed the Court to instruct the jury, that the testimony of Holt was incompetent.

But the COURT (*nem. con.*) refused so to instruct them, and said that the facts proved went to his credit only.

Mr. Key, for the United States, then offered to examine Mrs. Lucas again, who had been before examined in behalf of the United States, and who, after her examination, had remained in court, and heard the examination of other witnesses who were examined after her examination. She was now offered to rebut the defence set up by the prisoner, that the deceased was a drunkard, and had got her bruises by falling.

Mr. Coxe and Mr. Brent, for the prisoner, objected that she was within the rule which rejected Connelly.

The COURT (MORSELL, J., absent,) decided, that the Attorney of the United States had a right to examine witnesses to rebut the defence set up, and, for that purpose, to examine again those who had been before examined, although they had remained in court after their first examination.

The COURT, at the motion of the Attorney of the United States, instructed the jury, that if they believe, from the evidence, that the deceased was in a weak state of health, from a previous miscarriage, and while in such state, was cruelly, deliberately, and wilfully so beaten by the prisoner, as apparently to endanger her life, or to produce some great bodily harm, and that such beating, and such state of bodily health, arising as aforesaid, were the combined causes of the fever of which she died, then the prisoner is guilty of murder, if the said beating was inflicted with malice aforethought; and of manslaughter, if inflicted without such malice; unless they should be satisfied, by the evidence, that the fever became mortal by reason of some positive misconduct of the deceased during her last sickness, or the mismanagement of her attendants.

And on the prayer of the prisoner's counsel,

The COURT (*nem. con.*) instructed the jury, that if they should not be satisfied by the said evidence, that the death of the deceased was occasioned by the said wounds upon her body, or that the wounds which occasioned her death were caused by the violent acts of the accused, then the prisoner is entitled to a verdict of not guilty; and that if the jury should be of opinion, from the said evidence, that the wounds so received by the deceased, were not mortal in their character, but that the fever which caused her death, was rendered mortal by some positive, supervening cause or stimulant, independent of and not produced by the wounds or beating, or other act of the prisoner, then the prisoner is, in like manner, entitled to a verdict of acquittal.

Memorandum. On the first day of the trial, the Court and jury having been in session from 10 A. M. to half past 5 P. M., without having taken any food or refreshment, it became a question what should be done with the jury. There were thirty or forty more witnesses to be examined, and it was impossible to finish the cause that night. The prisoner and the Attorney of the United States were willing that the jurors should separate and meet again in the morning.

CRANCH, C. J., thought it might be so done by consent. It was so done in *Berry's case*, in this Court, in December, 1830. But MORSELL, J., being clear that the Court had not the power to make such an order, and CRANCH, C. J., and THRUSTON, J., doubting, it was decided to be the safest course to keep the jury, and

it was so ordered, and they were so kept by the marshal on Monday and Tuesday nights.

The following is the order entered on the minutes of the Court :
" By consent of the prisoner, the trial of this cause is adjourned until to-morrow morning at 10 o'clock ; and the marshal is commanded to keep the jury together until the next meeting of the Court, and then to bring them into court ; and in the mean time not to speak to them himself, nor to suffer any other person to speak to them relative to any matter touching the trial of this issue ; and it is ordered that the bailiffs who may be employed by him for that purpose, be sworn accordingly."

The jury retired at half past 8 P. M. to consider of their verdict, and at 10 P. M. returned with a verdict of acquittal.

UNITED STATES v. JOHN GOURE.

A constable is not in the discharge of his official duty when searching for a man, (who is represented to him as, and whom he believes to be, a loose and disorderly person without visible means of livelihood, a night-walker and frequenter of bawdy-houses, and a keeper of false keys,) with intent to arrest him without a warrant, and carry him before a justice of the peace to be dealt with according to law ; and it is not an indictable offence to threaten to kill the constable if he should attempt to arrest him.

THE defendant was convicted upon the following indictment :
" District of Columbia, Washington County, to wit :

" The Jurors of the United States for the county aforesaid upon their oath present, That Richard R. Burr and Lambert S. Beck, being constables of the county aforesaid duly appointed and qualified, and acting in their said office as conservators of the peace of said county, upon information duly and lawfully to them made and given, that a certain John Goure, late of Washington county, yeoman, was a loose and disorderly person without any visible means of livelihood, a night-walker and frequenter of bawdy-houses, and a keeper of false keys, and knowing and believing the said information to be true, did thereupon, in the discharge of the duties of their said office, on the 13th of December, 1834, at the county aforesaid, proceed to search for the said John Goure, in order to arrest him by virtue of their said office and take him before a justice of the peace of said county to be dealt with according to law. And the said John Goure, well knowing the premises, and being such loose and disorderly person without any visible means of livelihood, and a night-walker, and frequenter of bawdy-houses, and a keeper of false keys, as aforesaid, and as such well knowing that he was liable to arrest as aforesaid, to be dealt with accord-

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ing to law; and intending to intimidate the said Burr and Beck, and to prevent them from the discharge of their duty as aforesaid, and to hinder and obstruct them in the discharge of their said duty in searching for and arresting said Goure, on the day and year aforesaid, with force and arms at the county aforesaid, did threaten to kill the said Burr and the said Beck if they should attempt to discharge their said duty in searching for and arresting the said Goure; to the disturbance of the peace, and the obstruction of public justice, and against the peace and government of the United States."

Mr. Bryce and *Mr. Brent*, moved in arrest of judgment, and contended that the constables were not in the discharge of their official duty in searching for a supposed offender without a warrant; and cited 2 Hawk. c. 12, § 18; Id. c. 13, § 7; 4 Bl. Com. c. 10, § 3; 1 Burn, 103; 1 Chitty, 14, 20, 21, 22, 24.

Mr Bradley, for the United States, cited the Maryland law of 1715, c. 15, § 1, for the oath of a constable; and the by-law of the Corporation of Washington; Rothwell, 64.

The COURT (THRUSTON, J., *contra*, and CRANCH, C. J., doubting,) arrested the judgment, the officers not appearing to be in the discharge of their official duty in searching for the man to arrest him without a warrant.

 RUNAWAYS, AND PETITIONERS FOR FREEDOM.

The marshal has not a right to include, in his account against the United States, his imprisonment fees for persons committed as runaway servants or slaves, under the adopted laws of Maryland.

The marshal may include, in his account against the United States, his fees for the maintenance of petitioners for freedom committed by order of the Court for safe-keeping, if they obtain their freedom; otherwise their owners must pay the marshal's fees for their maintenance in prison.

THE following questions were submitted to CRANCH, C. J., by the Attorney of the United States, and the Marshal.

Whether the United States are liable to the marshal for the maintenance of free colored persons committed by justices of the peace as runaways, and discharged on *habeas corpus*. And also for the maintenance of petitioners for freedom, committed by order of the Court for safe keeping because their pretended masters will not give security for the petitioners' appearance in court to attend the trial, &c.

1st. As to those committed as runaways.

1. Is the marshal bound to receive and feed them?

2. If so, are the United States liable to him for his fees for

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keeping and feeding free persons committed as runaways, and discharged on *habeas corpus*.

CRANCH, C. J., delivered the following opinion.

By the Act of Congress of the 27th of February, 1801, [2 Stat. at Large, 103,] the laws of Maryland, as they then existed, were continued in force in the county of Washington. By the seventh section the marshal is to "have the custody of the gaols of the counties, and to be accountable for the safe keeping of all prisoners legally committed therein;" "and shall have the same powers, and perform the same duties as is by law directed and provided in the cases of marshals of the United States;" and by section 9, he is entitled to the same fees, perquisites, and emoluments, which are by law allowed to the marshal of the Maryland district.

By the Act of Congress of the 8th of May, 1792, § 4, [1 Stat. at Large, 275,] the compensation to the marshal for the maintenance of prisoners confined in gaol for any criminal offence, and for the commitment and discharge of such prisoner, shall be included in the account of the marshal; and the same having been examined and certified by the court or one of the judges, in which the service shall have been rendered, shall be passed in the same manner, at, and the amount thereof paid out of, the treasury of the United States to the marshal.

By the Act of the 28th of February, 1795, § 9, [1 Stat. at Large, 424,] "the marshals of the several districts and their deputies shall have the same powers in executing the laws of the United States as sheriffs and their deputies in the several States have, by law, in executing the laws of the respective States."

The question is, Were those prisoners legally committed for any criminal offence? For if they were, the act of Congress is imperative that the compensation of the marshal for their maintenance, and his fees for their commitment and discharge, are to be included in his account; which, when examined and certified by the court, or one of its judges, must be passed and paid at the Treasury.

By the Act of Maryland, 1715, c. 44, § 2, it is enacted, that no servant, whether by indenture or otherwise, according to the custom of the country, or hired for wages, shall travel ten miles from the house of his master without a note under his hand, under the penalty of being taken as a runaway, and to suffer such penalties as are hereafter provided against runaways.

And by the third section of the same act, any servant unlawfully absenting himself from his master, shall make satisfaction, by servitude or otherwise, at the discretion of the justices of the county court where such runaway servant did dwell, not exceeding ten days' service for any one day's absence, with such reason-

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able costs for his taking up, as the court should think fit, be it before or after the expiration of such servant's first time of servitude by indenture or otherwise.

The fourth and fifth sections prohibit the harboring of servants or slaves.

By the sixth section of the same act, it is enacted, that, "for the better discovery of runaways," "any person travelling out of the county where he shall reside or live, without a pass under the seal of the said county, if apprehended, not being sufficiently known, or able to give a good account of himself, shall be left to the discretion of the magistrate before whom he shall be brought, to judge thereof; and if, before such magistrate, such person, so taken up, shall be deemed and taken as a runaway, he shall suffer such fines and penalties as are hereby provided against runaways."

The seventh section of the same act: "For the encouragement of all persons to seize and take up such runaways, travelling without passes as aforesaid, not being able to give a sufficient account of themselves as aforesaid, shall have two hundred pounds of tobacco, to be paid by the owner of such runaway servant, (negro or slave.) And if such suspected runaways be not servants, and refuse to pay the same, they shall make satisfaction by servitude or otherwise, as the justices of the provincial and county courts where such persons are so apprehended and taken up, shall think fit."

The eighth section gives a reward to Indians for apprehending runaway slaves.

The ninth section provides that the person taken up shall be brought before the next magistrate, who is empowered to take him into custody, or otherwise secure him until he shall give "security to answer the premises," at the next court in the county; which court shall secure him until he can make satisfaction to the person who apprehended him. And the county commissioners are to cause a note of his name to be set up at the next adjacent court, and at the provincial court and secretary's office, that masters may know where to find their servants.

The tenth section ascertains the freedom dues of servants according to the custom of the country.

The eleventh, twelfth, and thirteenth sections forbid all persons to trade or deal with servants or slaves.

The fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, and nineteenth sections regulate the time of service of imported servants.

The twentieth section gives a reward for taking up such servants and slaves, in Pennsylvania and Virginia, to be paid by the master or owner; but if the person so taken up be a freeman and

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refuse to pay the reward, the magistrate before whom he shall be brought shall forthwith commit such person to prison till he shall give security or make full satisfaction by servitude or otherwise.

The twenty-first section provides for the humane treatment of servants by their masters, and limits their correction to ten lashes, unless by order of a magistrate, who cannot order more than 39.

The twenty-second section declares all slaves imported and to be imported, and their children, to be slaves for life.

The twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, and twenty-seventh sections relate to marriage and sexual intercourse between whites and blacks.

The twenty-eighth and twenty-ninth sections relate to female servants having bastard children.

The thirtieth and thirty-first sections authorize the provincial and county courts to hear and determine complaints between masters and servants by way of petition without a jury.

The thirty-second section prohibits slaves from carrying guns.

The thirty-third section makes it felony in a servant to take and purloin his master's goods and prescribes the punishment.

The thirty-fourth section enacts, that no sheriff or gaoler shall hold any suspected runaway longer than six months, he serving the sheriff or gaoler or his assigns so many days as he was in custody; or paying ten pounds of tobacco per day to the sheriff for his imprisonment fees, and no more, and paying to the person who took him up two hundred pounds of tobacco, or serving him twenty days in lieu thereof.

The Act of May, 1719, c. 2, after premising that by the Act of 1715, c. 44, relating to servants and slaves, "there is no provision made what shall be done with such runaway servants and slaves that now are or hereafter shall or may be taken up and committed to the custody of any sheriff within this province, where the master or owner of such servant or slave having due notice of such servant's or such slave's being in the custody of such sheriff, refuses or delays to redeem such servant or slave by paying their imprisonment fees, and such other charge as has or may accrue for taking up such servant or slave," enacts, "that every sheriff that now hath, or hereafter shall have, committed into his custody any runaway servants or slaves, after one month's notice given to the master or owner thereof, of their being in his custody, if living within this province; or two months' notice if living in any of the neighboring provinces, if such master or owner of such servants or slaves do not appear within the time limited as aforesaid and pay or secure to be paid all such imprisonment fees due to such sheriff from the time of the commitment of such servants or slaves; and also such

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other charges as have accrued or become due to any person for taking up such runaway servants or slaves; such sheriff is hereby authorized and required, (such time limited as aforesaid being expired,) immediately to give public notice to all persons by setting up notes at the church and court-house doors of the county where such servant or slave is in custody, of the time and place of sale of such servants or slaves by him to be appointed, not less than ten days after such time limited as aforesaid, being expired; and at such time and place, by him appointed as aforesaid, to proceed to sell and dispose of such servant or slave to the highest bidder; and out of the money or tobacco which such servant or slave is sold for, to pay himself all such imprisonment fees as are his just due for the time he has kept such servant or slave in his custody; and also to pay such other charges, fees, or reward as has become due to any person for taking up such runaway servant or slave, and after such payments made, if any residue shall remain of the money or tobacco such servant or slave was sold for, such sheriff shall only be accountable to the master or owner of such servant or slave, for such residue or remainder as aforesaid, and not otherwise."

By the Act of 1751, c. 14, § 8, it is enacted, "that where any slave shall be guilty of riding, rambling, or going about in the night, or riding horses in the daytime without leave, or running away, it shall and may be lawful for the justices of the county court, and they are hereby obliged, upon the application or complaint of the master or owner of such slave, or to his, her, or their order, or on the application or complaint of any other person who shall be any ways damnified or injured by such slave, immediately such slave to punish by whipping, cropping, or branding in the cheek with the letter R; or otherwise, not extending to life or to render such slave unfit for labor."

By the Act of May, 1766, c. 6, it is enacted, "that all legal fees that shall arise on the prosecution of any negro or other slave in any county court, whether such slave shall be convicted or acquitted, shall be chargeable to and paid by, the respective county where such prosecution shall be had, and assessed in the county levy of such county.

The Act of 1792, c. 72, is entitled "An Act to restrain the ill practices of sheriffs, and to direct their conduct respecting runaways," and enacts as follows:

"Whereas, it is represented to this General Assembly, that the sheriffs of the respective counties have neglected to advertise runaways to the great injury of the owners, therefore,

2. "Be it enacted, &c., that it be the duty of the several and respective sheriffs, and they are hereby required and directed, upon

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any runaway being committed to their custody, to cause the same to be advertised in some public newspaper, within twenty days after such commitment ; and to make particular and minute description of the person, clothes, and any bodily marks of such runaway."

3. " And be it enacted, that if no person shall apply for such runaway within thirty days from such commitment, then it shall be the duty of such sheriff, if residing on the western shore, to cause the said runaway to be advertised, as heretofore directed, in the Maryland Journal and Georgetown Weekly Ledger ; and if residing on the eastern shore, to cause the same to be advertised in the Maryland Herald, and Maryland Journal, within sixty days from such commitment, and to continue the same therein until the said runaway is released by due course of law.

4. " And be it enacted, that if any sheriff shall refuse or neglect to comply with the directions of this act he shall for every such refusal or neglect, forfeit and pay the sum of £ 20, current money, to the owner of such runaway."

By the Act of 1715, c. 26, §§ 8 and 9, it was enacted, " That no sheriff or other officer should charge the county or the public with any fees for any criminal committed to his charge having sufficient estate wherewith to pay the same, or being capable to pay the same by servitude ; but that such criminals, being discharged by order and due course of law, shall pay their own fees to the officers out of his estate, or by servitude, or otherwise ; provided that this act shall not extend to servants, criminals for whom the county shall pay such fees as are due to the officers."

And by section 10, of the same act, all officers' fees due by law from criminal servants shall be paid by the county where the facts shall be committed ; and such criminal servants shall, at the expiration of their time of servitude to their masters, pay the same to the commissioners of the county, (for the use of the county,) who shall make rules for the servants to make such reasonable satisfaction to the county as they shall think fit, and in such manner as they shall find convenient.

And by the 11th section, the masters of such servants are required to deliver them up to the sheriff at the expiration of their servitude, under the penalty of paying the fees themselves ; and the sheriff is to secure the servant to appear before the next county court to be disposed of as the court shall consider.

The Act of 1727, c. 2, is entitled, " An Act directing the payment of fees arising due on the prosecution of white servants which shall hereafter be imported into this province," and has the following preamble :

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“Forasmuch as it is evident to this present General Assembly, that the charges of late arising to the public and several of the counties within this province, on the prosecution of servants, have been a very great burden to the public; and whereas it is manifest that several felonies and other offences have been frequently committed which might have been prevented by their masters by taking care to keep them in due order and subjection; and sometimes servants have been induced by the encouragement, and sometimes by the severity of their masters, to commit felonies and other crimes, the masters well knowing that in case of prosecution the expense thereof must have been borne by the public, or the inhabitants of the county or counties where the facts have been committed; for remedy of which evils,”

“Be it enacted,” &c., “That it shall be lawful for the officers to whom any fees shall arise due on any prosecution of the lord proprietor against any servant that shall be imported into this province after the end of this session to recover the same from the masters as if they were their proper debts; and that it shall not be lawful for any officer to charge the public, or any county, for any fees on the prosecution of such servants, any law to the contrary notwithstanding.”

By the 3d section, it is provided, “that the owners of such servants, (unless the offence be capital, and the offender actually executed for the same,) at or before the expiration of the servant’s servitude may carry him before the county court, who are to judge what time, not exceeding three years, the servant shall serve his master in recompense of the fees paid by the master.”

The above seems to be all the statute law bearing upon the question.

None of the laws of Maryland authorize the sheriff to charge the State or any county with the maintenance of persons committed as runaways.

If the person committed be a servant, the fees are to be paid by the master, or by the prolonged servitude of the servant; if he be a slave the fees are to be paid by the owner; or by a sale of the slave; but if he be neither a servant nor a slave, and consequently not a runaway, there is no means provided by the law of Maryland for the recovery from the State, of the expenses of his maintenance in prison.

The 7th, 9th, and 20th sections of the Act of 1715, c. 44, authorize the condemnation of a free person to servitude only in case of refusal to pay the reward for apprehending him; not for the sheriff’s fees for his imprisonment.

The 34th section of the Act, however, impliedly subjects him to servitude to the sheriff or his assigns for the imprisonment fees,

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and to the taker up, for the reward ; but gives no authority to charge the State or the county with those fees.

The Act of 1719, c. 2, applies only to servants and slaves whose masters are known and have had notice.

The Act of 1766, c. 6, charges the county with the fees of prosecuting slaves in the county court, but does not apply to those taken up for running away, and punishable therefor under the Act of 1751, c. 14, § 8.

The Act of 1715, c. 26, §§ 8 and 9, only charged the county with the fees of prosecution of criminal servants ; not with the imprisonment fees of runaways, and was repealed by the Act of October, 1727, c. 2, which authorizes the officers to recover the fees of prosecution from the masters only, who are to be reimbursed by the prolonged services of the servants.

The Act of 1792, c. 72, is merely directory to the sheriffs to give certain public notices in addition to those previously required by the Act of 1719, c. 2, but gives no new authority to sell, or to charge the fees to the State or to the county.

There is nothing, therefore, in the laws of Maryland which authorized the sheriff to charge the imprisonment fees of runaways to the public, or even to the county, in any case.

It is under the Maryland law only that suspected runaways are liable to imprisonment in the county gaol. The same law directs the manner in which the sheriff is to recover his fees for the imprisonment, as far as it has made them recoverable at all.

By the Act of Congress the law of Maryland is continued in force. To say that the sheriff, or the marshal who is substituted for the sheriff, shall have another remedy than that which is given by the Maryland law, is not to continue the old law, but to give a new law.

But, by the Act of Congress of the 8th of May, 1792, § 4, [1 Stat. at Large, 275,] the compensation of the marshal, for the maintenance of prisoners confined in gaol for any criminal offence, shall be included in his account, and paid out of the Treasury of the United States.

Is this offence of running away, which is made such by the Maryland law only, such a criminal offence as is contemplated by the Act of Congress ?

Did Congress intend to relieve the master of the servant, and the owner of the slave, and the servant and slave, also, from the payment of those fees ?

The Act of Congress, in terms, applies, at least, as strongly to the case of a servant or slave who is actually a runaway, as to a person who is wrongfully committed as such.

The law of Maryland imposes no fine on a runaway, for the

benefit of the State or county, and gives the State no right to costs against him; indeed, it does not subject him to a public prosecution. The punishment of a slave, for running away, is to be inflicted by the justices of the County Court, under the Act of 1751, c. 14, § 8, only upon the application, complaint, or order of the master or owner, or upon the application or complaint of some person damnified or injured by such slave; and by the words of the act, the justices are obliged, immediately upon such application, to inflict the punishment in a summary way, without a trial. Such a proceeding cannot be called a prosecution, within the meaning of the Act of 1766, c. 6.

The law of Maryland was evidently made for the sole benefit of masters, and the public was no otherwise concerned, than as the law tended to give a greater security to that kind of property which a master has in the services of his servant or slave. The only penalty upon a runaway servant was compensation to the master for the loss of his service, and the payment of his imprisonment fees, and a reward to the person who apprehended him. All this enured to the benefit of individuals, not of the public.

I do not think that running away is such a criminal offence as is contemplated by the Act of Congress of the 8th of May, 1792, § 4. [1 Stat. at Large, 275.]

It seems to me that the law of Maryland, which was continued in force, should be executed, after the separation, in the same manner as it was executed before; and that the marshal has no more right to look to the United States for payment of his fees, than the sheriff had to look to the State of Maryland, before the separation.

Such was the construction of the adopted laws, by the judges of this Court, immediately after the separation, and acquiesced in by the respective marshals, as I believe, up to the present time — a period of twenty-four years.

In point of fact, I believe there have been very few, if any, legal commitments of persons, as runaways. I have seen many of the warrants of commitment, and I do not remember to have seen one which would, in my opinion, justify the marshal in detaining the prisoner. The justice, generally, only says that the person was brought before him as a runaway, and requires the marshal to receive and keep him until discharged in due course of law. The justice does not state that he has good cause, supported by oath, to believe that the person is a servant or slave, (without which he cannot be a runaway,) nor even that he has adjudged him to be a runaway; at least, I have never seen a warrant of commitment which states that the person has been convicted, before the justice, of being a runaway. Before a

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justice of the peace can lawfully commit a person as a runaway, I imagine the justice must have examined the circumstances and the evidence, and must have exercised his judgment; and must be satisfied, by testimony, upon oath or solemn affirmation, that the person is really a runaway.

If a person be found travelling out of the county where he resides, without a pass, under the seal of the county, he may, under the 6th section of the Act of 1715, c. 44, be taken up and carried before a justice of the peace; but the circumstance of travelling without a pass, is not, of itself, sufficient to justify the magistrate in committing him as a runaway. He is still to inquire whether the person is sufficiently known, and what account he can give of himself, and not to commit him unless he shall be satisfied by the evidence, and shall adjudge that he ought to be deemed and taken as a runaway.

Color is said to be evidence of slavery; and a slave found abroad, without a pass, is liable to be taken up, as a runaway, and carried before a justice of the peace; but the circumstance of his being found without a pass, is not alone sufficient to justify the magistrate in committing him as a runaway. The justice is still bound to inquire into the circumstances, and to exercise his judgment; and must adjudge him to be a runaway before he can lawfully commit him.

Color is only *primâ facie* evidence of slavery, and may be rebutted by other evidence, such as, that the prisoner has long lived and acted publicly as a free man, or evidence that his mother was a free woman, &c.

In all cases of commitment the justice ought to be satisfied, by evidence, as I apprehend, that the person is a runaway servant or slave.

Upon the whole, I am of opinion that the marshal has not a right to include, in his account against the United States, his imprisonment fees for persons committed as runaway servants or slaves under the adopted laws of Maryland.

The other question submitted, is,

Whether the United States are liable to the marshal for the maintenance of petitioners for freedom, committed, by order of the Court, for safe keeping, because their pretended masters or owners will not give security for the petitioners' appearance in court, to attend the trial, &c.

When a petition for freedom is filed, it has been long the practice of the courts in Maryland, before they will permit the defendant or respondent to appear in the cause, to require him to give security, by way of recognizance, for the appearance and security of the petitioners. If the defendant should refuse to give

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such security, there might be a failure of justice, by the defendant seizing the petitioners and removing them from the jurisdiction of the court. To prevent this failure of justice, the Court, where they have had reason to believe that the defendant would be guilty of such a contempt, have ordered the marshal to take and safely keep the petitioners until the trial, or until the defendant will give the security required by the rules of the Court. The expense of maintaining them in the custody of the marshal, for that purpose, is one of the reasonable contingencies accruing in holding the Court, and ought to be allowed if the petitioners gain their freedom; otherwise, that expense must be paid by their owners.

YOUNG v. YOUNG.

The trustee of a family settlement, in which infants are interested, may be changed by consent of the parties, upon a bill filed for that purpose only.

THIS was a bill in equity, to change the trustee of a family settlement in which infants were interested, by consent of the parties. The sole object of the bill, and the whole relief prayed, was the change of the trustee, with the consent of the parties.

The COURT, at first, had great doubt of its jurisdiction, in such a case, so as to discharge the present trustee from his obligation.

But *Mr. C. Cox* cited the following authorities; and the Court, in May, 1832, would have made a decree, but, as the Court required the new trustee to give security, because infants were interested, who could not consent, the decree was never signed.

The authorities cited, were *Twedale v. Ettrick*, 2 Ch. Ca. 130; *Lake v. De Lambert*, 4 Ves. 248, 592; *Buchanan v. Hamilton*, 5 Id. 722; 2 Com. Dig. tit. Chancery, 4, W. 6, 7.

CIRCUIT COURT OF THE UNITED STATES.

MARCH TERM, 1835, AT WASHINGTON.

NEGRO JOHN THORNTON v. IRRINE DAVIS.

If a petition for freedom be filed, and a bill for an injunction to restrain the master from removing the petitioner out of the jurisdiction of the Court, the injunction may be granted on the affidavit of the petitioner; and if the injunction be not obeyed, an attachment may issue upon a proper affidavit; and, if the party be taken upon the attachment, and brought into Court, he will not be discharged until he has given security, as required by the rules and practice of the Court that the petitioner shall be permitted to attend the trial, &c.

The Court, upon an attachment of contempt, by disobeying an injunction, will not hear witnesses to contradict the affidavit, nor grant a rule to show cause.

The Court will not quash an attachment on account of a misnomer in the injunction, nor receive a plea in abatement.

PETITION FOR FREEDOM.

Upon filing the petition, and a bill for an injunction, the chief justice had, in vacation, granted an injunction to restrain the defendant from removing the petitioner from the jurisdiction of the Court until further order.

Mr. W. L. Brent now moved for an attachment against Davis, for disobeying the injunction, and removing the petitioner, upon an affidavit stating the service and contemptuous language used by the defendant, on the service of the injunction, and his determination to remove the petitioner, if he could find him, and an offer of \$75 if any one would find him; and also stating the belief of the affiant that he has been removed; and that the defendant admitted that he had removed him; and that the defendant was not a resident of the District of Columbia, and was about to leave it.

Mr. Coxe and *Mr. Dandridge* objected, and contended that the practice was to issue, first, a rule to show cause, and offered to examine witnesses to contradict the affidavit.

But the COURT (*THRUSTON, J.*, absent,) refused to hear them; and, as the defendant was a non-resident, and about to leave the District, refused to grant a rule to show cause, but issued an

attachment returnable immediately, it being a case of disobedience of the process of this Court, as a court of chancery, in which case it is not usual to issue a previous rule to show cause.

Mr. H. B. Robinson, and Mr. Madison Jeffers, two of the constables of this county, having been, in argument, charged by Mr. Brent with assisting the defendant in disobeying the injunction, were permitted to speak in their own justification, and, among other things, stated facts implicating the purity of the professional character of Mr. Giberson, one of the counsel of the petitioner in this cause, intimating that he had consented to take \$25 for discovering where the petitioner was, so that he might be seized by the constables who were trying to catch him to deliver him up to his master, so that he might carry him away out of the jurisdiction of this Court, in violation of the injunction.

Whereupon *Mr. Key*, Attorney of the United States, said that, at the suggestion of several members of the bar, he thought it due to them and to the Court, to request the Court to take judicial notice of the matter; and, with this view, stated the charge in writing, and moved for a rule on Mr. Giberson to show cause on Thursday next, why he should not be dismissed from the bar, or be otherwise dealt with as to the Court should seem proper.

The attachment against *Orrine Davis* was returned, and the defendant appeared.

Mr. Coxe, for the defendant, moved to quash the attachment, on the ground of misnomer, and the injunction, because granted on the affidavit of the petitioner. The name in the injunction is *Irrine Davis*, not *Orrine Davis*, which is the name in the attachment, and is his true name.

Mr. Coxe, as to the misnomer, cited *Wilkes v. Lawrence*, 2 Taunt. 399; *Rex v. Shakspeare*, 10 East, 83; *Petersdorf*, 654, "Misnomer;" 1 Chitty on Pl. 280.

Mr. W. L. Brent, contrà. It is the usual course to grant an injunction upon the affidavit of the petitioner for freedom.

Mr. Coxe said, in reply, that the authority of the Court to issue an injunction in such a case, upon such an affidavit, is seriously doubted; and that doubt has been suggested from the bench. A colored man is, *primâ facie*, a slave, who cannot testify in any case.

The COURT (THRUSTON, J., absent,) gave no opinion as to the effect of the misnomer, nor upon the validity of an injunction granted upon the affidavit of the petitioner, a colored man; but said, that as the defendant had not denied that he removed the negro after the service of the injunction, there was a technical contempt, although he might have had no intention to treat the process of the Court with contempt. And as he is now present in

Court, and has not obeyed the subpœna to answer the petition for freedom filed by the negro, by appearing and entering into the usual recognizance to produce the petitioner here at the trial, &c. ; the Court would not discharge him from the attachment until he should have given the usual security by way of recognizance.

Mr. Dandridge, for the defendant, offered a plea of misnomer in abatement.

The COURT, however, (THRUSTON, J., absent,) rejected it, for the following reasons :

The proceeding by petition for freedom is a summary proceeding ; it has little or no analogy to an action at common law, and is not subject to the technical rules of pleading. It is a petition by a person *primâ facie* incompetent to maintain an action at law. It is framed in the simplest terms ; complaining that the petitioner is a freeman, but is held in slavery by the person named, and praying that he may be summoned to answer the petition. The trial of the fact as well as the law is to be by the Court, unless either party should apply to the Court for the benefit of a trial by jury ; in which case the Court is to charge the attending jury to determine each and all of the allegations, contained in the petition, which may be controverted ; and either party may challenge twelve of the jurors peremptorily, and may take bills of exception and appeal as to matter of law. Here is no original writ necessary to give jurisdiction to the Court, (as in England,) and which is the subject of abatement ; nor is there any technical declaration which can vary from the original writ, and be the cause of its abatement, or the subject of special pleading. There can be no personal judgment against the respondent, the judgment of the Court only establishes a fact ; namely, the freedom or the slavery of the petitioner. If the right person be summoned, which is admitted in the plea, it is immaterial by what name he is called in the summons. The issue upon a petition for freedom is upon the mere right, and is as simple as it is in a writ of right ; and the Court will not suffer the merits of the case to be smothered in the technicalities of special pleading in the one case, any more than in the other.

The respondent can only give a general denial to the allegations of the petition, or disclaim all title to the petitioner, or deny the jurisdiction of the Court.

But if the respondent had a right to put in a plea of misnomer in abatement, the plea now offered would be bad on demurrer, for the following reasons :

1. Because there is no original writ to be abated ; and when, in a plea in abatement, the defendant prays judgment of the writ, no other writ is intended than the original writ issuing out of

Ex parte Giberson.

chancery in the name of the king, (*teste meipso*,) which is the only foundation of the authority of the Court to take cognizance of the cause.

2. Because it commences with praying judgment of the writ, and concludes to the jurisdiction of the Court; when the matter of the plea, if true, does not oust the Court of its jurisdiction, but is only an excuse for the defendant's not answering to that writ.

3. Because it does not conclude with any prayer for judgment.

In dilatory pleas the greatest accuracy is required in framing them; and they should be certain to every intent. 1 Chitty, 444, 445.

The Court, therefore, refuses to receive the plea,

1. Because the proceedings in the cause are summary.

2. Because no personal judgment can be rendered against the respondent.

3. Because the plea, if received, would be bad upon demurrer.

Ex parte G. L. GIBERSON.

Fidelity to his client is one of the first requisites in the character of an honorable practitioner at the bar. That fidelity requires that he should maintain all the just rights of his client; but it extends no further. It will not justify any attempt to evade the fair operation of the law or to impede the administration of justice.

A fault on either side of the true line of honorable professional conduct will equally meet the decided reprehension of the Court.

IN the case of *Negro John Thornton v. Orrine Davis*, (which was a petition for freedom,) upon a motion for attachment against the defendant for disobeying an injunction, H. B. Robinson and Madison Jeffers, two of the constables of this county, having been charged, in argument, by *Mr. Brent*, with assisting the defendant in violating the injunction, were permitted to speak in their own justification; and, among other things, stated facts implicating the purity of the professional character of *Mr. Giberson*. Whereupon *Mr. Key*, District Attorney, filed certain allegations against him, and obtained a rule to show cause why he should not be dismissed from the bar, or be otherwise dealt with as to the Court should seem proper.

Upon the hearing, *Mr. Robinson*, *Mr. Dandridge*, and *Mr. Jeffers* were examined as witnesses in support of the rule; and *Mr. B. K. Morsell*, *Mr. Brice*, *Mr. W. L. Brent*, and *Mr. Smallwood*, against it.

CRANCH, C. J., delivered the opinion of the Court, (*THRUSTON*, J., absent.)

Ex parte Giberson.

The substance of the charge stated in this rule against Mr. Giberson, is infidelity to his client ; a charge, if true, of the gravest import, and which would deserve severe reprehension from the Court.

The specifications, in effect, are,

1st. That Mr. Giberson, after filing a petition for freedom for his client, and obtaining a subpœna and injunction to the master to prevent him from taking the petitioner out of the jurisdiction of this Court ; and believing that such was the intention of the master if he could find the petitioner ; and knowing that Robinson and Jeffers were employed by the master to take him for that purpose ; and knowing that the subpœna had been served on the master, instructed them that they might lawfully take him and deliver him to the said Davis.

2d. That he assented to a proposition made by the said Robinson and Jeffers, or one of them, to receive twenty-five dollars in case the petitioner was found and apprehended.

3d. That he promised them that if the petitioner came to his office he would give them notice so that he might be apprehended.

1. The bill which Mr. Giberson filed for an injunction is sufficient evidence that he believed that Mr. Davis intended to remove the petitioner out of the jurisdiction of this Court, if he could take him, notwithstanding the subpœna which had been served upon him to answer the petition for freedom. It seems also to be proved that he knew that Robinson and Jeffers were employed by Davis to take the petitioner for that purpose ; or, at least, to discover where he was, so that Davis might take him. It seems also to be proved, by the testimony of Robinson and Jeffers, that he told them that as the injunction had not been served there was no danger on their part in apprehending him, or taking him up.

This opinion, so far as it regards the danger arising from a violation of the injunction, was, perhaps, just ; but he ought to have informed them further, that an injunction had been granted, although not served ; and that if they, knowing that it had been issued, and that a subpœna to answer the petition had been served, should proceed to apprehend and deliver the petitioner to Mr. Davis, with a view to prevent the effect of the injunction, or to deprive the petitioner of the benefit of his suit, they would be guilty, if not of a contempt of Court, yet of a misdemeanor for which they might be punished.

If they had no reason to believe that Davis intended to take the petitioner away from the jurisdiction of this Court, so as to deprive him of the benefit of his suit, their apprehending him as a runaway slave, and delivering him to his master would not be unlawful, even if they knew of the service of the subpœna and injunction ;

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for the master is still entitled to the possession of the negro until his freedom shall be established, upon complying with the rules of the Court.

The omission of Mr. Giberson to give Robinson and Jeffers the additional caution which the case seemed to require, may have been the effect of a misapprehension of the law, or an imperfect view of the whole case; and will not justify us in saying that it proceeded from infidelity to his client, or any other corrupt motive.

2. The second specification is, that he assented to a proposition to receive twenty-five dollars in case the petitioner should be found and apprehended.

Mr. Giberson's assent to this proposition, is not proved by any positive evidence of the fact.

Mr. Robinson and Mr. Jeffers, however, were suffered by him to go away in the belief that he would give the information they wanted, and would take the bribe; but Mr. Giberson did not give them the necessary information, although it seems, from Mr. B. K. Morsell's testimony, that he possessed it. On the contrary, it is proved by Mr. Morsell and Mr. W. L. Brent, that he mentioned to them the offer and expressed great indignation that it should have been made.

Mr. Morsell also testifies that Mr. Giberson gave the petitioner notice that Robinson and Jeffers were seeking for him to deliver him up to Mr. Davis, and cautioned him against exposing himself.

Mr. Giberson, believing it to be the intention of Mr. Davis to carry the petitioner out of the jurisdiction of this Court, notwithstanding the subpœna and injunction, might have deemed it his duty to deceive Robinson and Jeffers with a view to give notice to the petitioner. The petitioner was, in fact, taken and carried out of this district by Davis, but not by Robinson and Jeffers, nor does it appear to have been through any information furnished by them, or by Mr. Giberson.

We must, therefore, acquit him of this part of the charge.

3. The third specification is, that he promised that if the petitioner came to his office, he would give Robinson and Jeffers notice, that he might be apprehended.

It appears, by their testimony, that Mr. Giberson did promise them that if the petitioner came to his office he would let them know it. But it also appears, by the testimony of Mr. Morsell and Mr. Brent, that he cautioned the petitioner against Robinson and Jeffers, and against coming to his office.

His subsequent conduct, when pressed to dismiss the suit, upon receiving the costs, appears to have been perfectly correct; and he expressed great indignation against Robinson and Jeffers when he

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supposed they had assisted Mr. Davis in carrying the petitioner beyond the jurisdiction of the Court, as appears by his letter to Mr. Robinson.

Upon the whole, we must acquit Mr. Giberson of any intentional infidelity to his client ; but we think he ought to have informed Robinson and Jeffers of the danger they would incur by assisting Mr. Davis in removing the petitioner from the jurisdiction of this Court, after notice or knowledge of his having filed his petition ; and that he ought to have repelled promptly, and with indignation, the unjustifiable offer of the twenty-five dollars. His not having done so, has cast a shade of suspicion over the transaction.

Fidelity to his client is one of the first requisites in the character of an honorable practitioner at the bar. That fidelity requires that he should maintain all the just rights of his client ; but it extends no further. It will not justify any attempt to evade the fair operation of the law, or to impede the administration of justice. A fault on either side of the true line of honorable professional conduct, will equally meet the decided reprehension of the Court.

The rule, in this case, may be discharged ; but we hope it will induce all concerned, (the officers of justice as well as the member of the bar upon whom it was laid,) to reflect upon, and fix in their minds the true honorable standard of official as well as professional practice.

UNITED STATES v. ROBERT CLARK.

In an indictment against a justice of the peace for taking insufficient bail in a criminal case, it is not necessary to state in what respects the bail was insufficient ; nor to set out the security taken ; nor to aver that the defendant ordered the offender to be discharged from the arrest. Motion to quash refused.

THIS was an indictment for corruptly taking "insufficient security," for the appearance of George Milburn, who was arrested on a *capias ad respondendum*, and in custody of the marshal upon an indictment for keeping "a certain gaming-table called a faro-bank," (against the form of the Act of Congress of the 2d of March, 1831, [4 Stat. at Large, 448,] which makes it a penitentiary offence,) whereby the said George Milburn was released from the custody of the marshal, and escaped ; and also by means whereof he did not appear at the said court, and therein made default, and hath not since appeared to be dealt with according to law, to the great hinderance of public justice, in contempt of the laws, and against the peace and government of the United States.

The counsel for the defendant moved the Court to quash the indictment.

1. Because it does not state in what respects the security taken was insufficient; whether it was insufficient because the sum was too small, or because the persons taken as bail were insufficient to answer the amount of the recognizance, or because the form in which the security was taken was insufficient; and because it does not set out the security taken, so that the Court can judge whether it was regularly taken, and in an amount adequate to the offence, and in due form.

2. Because it does not aver that the defendant ordered Milburn to be discharged from arrest.

CRANCH, C. J. Upon comparing this indictment with the form of an indictment for a similar offence in 2 Chitty's Cr. Law, 244, the COURT is of opinion that it is in substance a good indictment, and is sufficiently certain to require the defendant to plead to it.

The motion to quash it is, therefore, overruled. The other indictment against the same defendant for taking insufficient security in the case of Henry Miller, is even more full and formal than the other; and the motion to quash it is also overruled. THRUSTON, J., not sitting, as he was not present at the argument.

UNITED STATES v. JOHN ELDER.

Facts from which the jury may find the defendant guilty of keeping a disorderly house.
Common nuisance.

INDICTMENT for keeping a disorderly house. Verdict guilty. Motion for a new trial on the ground that the verdict was against evidence.

CRANCH, C. J., delivered the opinion of the Court.

There was evidence tending to prove the following facts:

That the defendant kept a public drinking-house in this city, where he sold spirituous liquors to all persons who would buy them, and suffered and encouraged persons to buy and drink them in his house. That his house was frequented by idle, disorderly, suspicious, and drunken persons, sometimes quarrelling and fighting, and making a great noise late at night and even till after midnight. That he kept a public ninepin alley, at which game people were often playing very late at night. That he suffered persons resident in this city to sit and continue drinking spirituous liquors in his house, until they were intoxicated, and this was suffered as much on Sundays as on other days. That

his house was small and not calculated for the entertainment of travellers, or even of lodgers, there being only two rooms on a floor, and the family occupying the upper stories. There was no evidence of his having had a tavern license at the time stated in the indictment, and respecting which the witnesses testified ; nor has any such license been produced, although called for by the Court upon this motion for a new trial. A transferred license has been produced, which expired on the first Monday of November, ber, and the time stated in the indictment is the 1st of December, 1834.

The indictment is in the common form, charging that he kept a disorderly house, and for lucre and gain caused and procured evil-disposed persons to frequent and come together in his house, and permitted them at unlawful times to be and remain there drinking, tippling, cursing, swearing, and quarrelling to the common nuisance, and in manifest destruction and corruption of youth and other people in their manners, conversation, morals, and estate, &c.

The question then is, whether a house kept in the manner, and for the purpose which, from the evidence, the jury had a right to infer that this house was kept, is not substantially a nuisance, within the meaning of the indictment and of the law. We think it is. Neither the Act of Assembly of Maryland respecting ordinary licenses, nor the charter of the city of Washington, nor the by-laws of that corporation, as far as we are informed, authorizes the keeping of such a house, in such a manner as it seems to the Court by the evidence given upon the trial, the defendant's house was kept.

If the defendant had had the most favorable license which the law allows, it could not have justified him in suffering idle, disorderly, suspicious, and drunken persons to meet together in and frequent his house, nor to suffer inhabitants of this city, not being lodgers or boarders in his house, to remain there drinking and tippling, for his lucre and gain, at any time ; and especially on Sundays. But if this was done without any license at all, as seems to have been the case, there can be no doubt that it is a common nuisance.

UNITED STATES v. NEHEMIAH BROWN.

What was said in the presence of the prisoner, before the examining magistrate and to which he made no reply cannot be given in evidence against him.

Mr. Key, District Attorney, offered to give in evidence against the prisoner, who was indicted for larceny, what had been said

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before the examining justice in the presence and hearing of the prisoner, to which he had made no reply.

Mr. W. L. Brent, for the defendant, objected, and cited *The People v. Johnson*, *Wheeler's Cases*, 377.

The COURT (THRUSTON, J., absent,) said that the United States could not give in evidence what was said while the prisoner was under examination before the justice, if the prisoner made no reply; for he is not bound to admit or deny what is said by the witnesses.

Mr. Key said he only meant to give evidence of what was said and replied to by the prisoner; and the examination was so confined.

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UNION BANK *et al.*, Creditors of S. Robertson, v. CLEMENT SMITH,
Administrator of Samuel Robertson.

The Orphans' Court may charge the administrator with interest in certain cases. If the administrator mingled the assets with his own funds, upon which he drew indiscriminately for his own purposes, he must be presumed to have applied them to his own temporary use and profit, and is chargeable with interest thereon for the whole time the assets were thus mingled, and used indiscriminately; and the Orphans' Court ought to have so decided.

THIS was an appeal from the Orphans' Court upon a plenary proceeding by libel and answer. The principal question in the cause, was, from what time the administrator should be chargeable with the interest upon the sum of \$8,390.01½ the amount of assets in his hands as administrator of the estate of Samuel Robinson.

The case was fully argued by *Mr. Dunlop* and *Mr. R. S. Coxe*, for the appellants; and by *Mr. Marbury* and *Mr. Jones*, for the appellee.

Mr. Dunlop, cited the following authorities on the subject of interest: *Gwinn v. Dorsey*, 4 Gill & Johnson, 453, 460; *Perkins v. Baynton*, 1 Bro. C. C. 375; *Shiffelin v. Steward*, 1 Johnson Ch. R. 620; *Newton v. Bennett*, 1 Bro. C. C. 359; *Brown v. Ricketts*, 4 Johns. Ch. Rep. 30; *Grandberry's case*, 1 Wash. 246; *Carter's case*, 5 Mun. 240; *McCall v. Peachy*, 3 Mun. 303.

Mr. Marbury and *Mr. Jones*, *contrà*, cited *Adams v. Gale*, 2 Atkins, 106; *Child v. Gibson*, Id. 603; 7 Har. & Johns. 42; *Wilson v. Wilson*, 3 Gill & Johns. 20; *Burch v. Gittings*, in Montgomery county, Maryland; *Granberry v. Granberry*, 1 Wash. 249; *Fitzgerald v. Jones*, 1 Mun. 150; *Lewis v. Bacon*, 3 Hen. & Mun. 89; *Lightfoot v. Price*, 4 Hen. & Mun. 341; *Shepherd v. Stake*, 3 Mun. 29; *Cavendish v. Fleming*, Id. 198; Hall's Index, Appendix, 631, 645, as to modes of charging interest.

CRANCH, C. J., delivered the opinion of the Court. (THRUSTON, J., absent.)

The libel states that on the 10th of April, 1827, the respondent settled his first administration account of the estate of Samuel Robinson, leaving a balance in his hands of \$8,390.01½ to be distributed among the creditors, being less than fifty per cent. of the whole amount of claims. The libellants aver that the respondent ought to be charged with interest upon that sum from the time he received it until the distribution, because he has used and employed it, and it has produced interest. That he ought, within thirteen months after the date of his letters of administration, to have paid to the libellants their proportion of the assets; and, not having done so he is liable for the interest from that time, although he may not have used the assets, and although they may not have earned interest. They also insist that he ought to have invested the assets in productive funds, and therefore is chargeable with interest; but he has refused to charge himself with interest, or to account therefor; wherefore they pray that he may be cited to account in the Orphans' Court and be decreed to charge himself with interest and to pay the libellants their respective proportions of the principal and interest, &c.

The answer of Mr. Smith admits the amount of assets in his hands, as charged; and states that the Bank of the United States gave him notice of their claim, and insisted that it was entitled to priority of payment. That Mr. Thompson, another of the libellants, also insisted that his claim was entitled to a preference; that these claims amounted to more than all the assets; and that these creditors gave him a written notice and request that the said assets should not be distributed until their right to priority of payment should be decided by the judgment of a court of equity in a suit then forthwith to be instituted; that the Union Bank denied the right of priority of payment claimed by those other creditors, and notified the respondent that they would contest the same; that in a suit brought by that bank against the respondent, to try the right of priority which was contested by those other creditors, judgment was finally rendered by the Supreme Court of the United States at January term, 1831, against the right of priority. That he was always ready with the funds to pay the creditors, from the time limited by law for the distribution, until he did distribute, in the year 1832, if the creditors could have agreed among themselves as to the priority of payment. He denies that he was in any default, and that he is chargeable with interest, having been always ready to pay, and has been only hindered by the litigation of the creditors among themselves. He denies that he was under any obligation to invest the assets in productive

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funds, and avers that he never did so invest them, or in any property from which he derived any profit, benefit, or advantage; nor did he lend the same for profit. That he placed them to his private account in the Farmers and Mechanics Bank of Georgetown, among his own funds, and drew on that account, as usual, when his convenience required. That he always had resources at his command, by which he could, at any time have paid the libellants, and was always ready and willing to pay them.

This answer having been excepted to, Mr. Smith, in a further answer, says that the sum of \$8,390.01½ was placed to his debit (credit?) in the Farmers and Mechanics Bank of Georgetown, on the 27th of March, 1827. That it appears by successive settlements of his accounts with that bank, that from that time to May, 1830, "a list of which is hereunto annexed as part of this answer," there were to the credit of his accounts, balances, whenever settled, of much larger amount than the assets, except for a short period in 1827 and 1828, "so that the said assets do not appear to have been used, (with the said exception,) before May, 1830," from which period, until the decision of the Supreme Court, he admits that the fund was used by him in his trade.

The list of balances, referred to, is not a list of balances in the respondent's account, but in the joint account of W. & C. Smith with the bank. It does not appear who W. & C. Smith were, but if it should appear that they were a mercantile firm, and that the assets were placed in the bank subject to their use and control, and mingled with their funds, I should think the respondent was chargeable with interest for the whole time the money was at their disposal, although they might have always had credit enough in bank to answer for it. It was a fund, when thus placed, which either partner had a right to draw out at any time; and it was as much liable to the creditors of W. & C. Smith, as to those of S. Robertson, and perhaps more so. If W. & C. Smith had failed, indebted to the bank, the bank would have retained it, and it would have been lost to the estate of Robertson. Although W. & C. Smith may not actually have used the money, yet it gave them credit with the bank, so that they might more readily obtain discounts.

In the case of *Treves v. Townsend*, 1 Bro. C. C. 384, the defendant contended that he ought not to be charged with interest, because "he always kept an equal sum at his bankers, ready to answer to it."

But to this Lord Loughborough answered: "the money of a merchant, at his bankers, does not lie idle; it is part of his stock in trade."

In the present case, it does not appear that W. & C. Smith

were not stockholders in the bank; and if they were, they derived a benefit from the deposit which the bank had a right to use in its ordinary business of discounting bills and notes.

It has been suggested that, although a court of equity could charge the respondent with interest, yet the Orphans' Court, which is of limited jurisdiction, cannot; for it can only charge the administrator with the actual increase of the estate in his hands.

But that point seems to be settled by the Court of Appeals in Maryland, in the case of *Gwinn v. Dorsey*, 4 Gill & Johns. 461. That case also decides the point, that, if an administrator has applied the assets to his own use and profit, he is chargeable with interest from the time he received them; and if he kept them by him, or omitted, without reason, to distribute them, he is chargeable with interest from the time limited by law for the distribution, whether he made profit by them or not.

Mr. Smith placed these assets in a situation where they may be presumed to have produced him profit, and if they did not, it was his own fault. It is true, that he was in no default for not having distributed the assets sooner than he did, but having mingled them with his own funds, upon which he drew, without discrimination, for his own purposes, or for those of the firm of W. & C. Smith, he must be presumed to have applied them to his own temporary use and profit.

The libel complains of the commission of five per cent. paid to a collector, and of ten per cent. claimed by the respondent, as commissions.

These complaints, however, seemed to have been abandoned at the argument, as matters within the exclusive discretion of the Orphans' Court. See *Wilson v. Wilson*, 2 Gill & Johns. 20.

This cause seems to have been set for hearing on bill and answer; Mr. Smith's answer, therefore, is to be received as evidence in his favor.

He there says, "When the money was payable by law, and at all times since, this respondent has been fully prepared, ready, and willing to settle the said estate, and pay over to the petitioners their shares of the said estate." "That he never did invest the said assets in any stock or other property from which he derived profit, benefit, or advantage; neither did he ever lend the same to any person for profit by the loan thereof." "That when the assets belonging to the estate of Robinson were paid to him, he placed them to his private (account?) with the bank, and among his own funds, supposing they would be called for, and paid out, at the expiration of the year as appointed by the order of the court. That when the said assets so stood to the credit of his

private account, he drew on that account, as usual, when his convenience required ; and even, when considerable sums were lying in his desk, and which he could as readily have used as the funds to his credit on the books of the bank." "This respondent avers that he always had resources at his command, by which he could at any time have paid the said petitioners, and that he was always ready and willing to have paid them."

And by his supplemental or further answer he says, "that the said sum of \$8,390, was placed to his debit" (credit) "in the Farmers and Mechanics Bank of Georgetown as aforesaid, on the 27th of March, 1827. That it appears, by successive settlements of his account with the said bank between that period and the month of May, 1830, a list of which is hereunto annexed as part of this answer, that there was, to the credit of his account, balances, whenever settled, of much larger amount than the amount of the said assets, except for a short period in the years 1827 and 1828 ; so that the said assets do not appear to have been used, with the said exceptions, before May in the year 1830. From this period (May, 1830) until the decision of the Supreme Court aforesaid, the respondent admits that the said fund was used by him in his trade ; but whether the same produced profit or loss, it is impossible for him to say, because he cannot tell to what purchases the said fund was applied ; mingled with the mass of his accounts there was no specific application of it. This respondent, however, says that as soon as the decision of the Supreme Court in the case between the said parties was made known to him he was provided with funds to pay, the said several parties libellants, their respective dividends of the said assets, and they were so notified," &c.

It may be observed that the respondent does not aver that these assets were not used by him for his own purposes ; he only says that he did not invest them in productive property, nor lend them for profit. Nor does he aver that they were always lying at his bankers ; he only avers that it appears by successive settlements of his account with the bank, that at the times of those settlements, except in 1827 and 1828, there were balances in his favor to a larger amount than the assets ; and the list of balances referred to, is not a list of balances of his private account, but of that of W. and C. Smith.

It appears, then, from his own answer, that he was in possession of this fund, in money, from the 27th of March, 1827, till some time in the year 1832 ; that he mingled it with his own funds at his bankers, and used the same indiscriminately with his own, for his own purposes, or for those of the firm of W. & C. Smith.

According to the list of balances there were several long periods

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during which it does not appear how the account stood ; but even if there was always enough in bank to the credit of W. & C. Smith to meet the assets when called for, I think the administrator was chargeable with interest for the whole time the money was mingled with his funds, or with those of W. & C. Smith, in, the bank, and used indiscriminately with their own funds for their own purposes ; and that the judge of the Orphans' Court, having the same evidence before him, ought to have so decided.

The precise time, when the administrator distributed the assets, does not appear in this record, but must appear upon his accounts settled with that court.

I think, therefore, that the decree of the Orphans' Court should be reversed, and the cause remanded with instruction to that court, in settlement of the administration account, to charge the administrator for interest upon \$8,390, at the rate of 6 per cent. per annum from the 27th of March, 1827, till the time or times respectively of his distributing the principal among the creditors.

See also *Hunter's Executors et al. v. Spotswood*, 1 Wash. 245 ; *Lomax v. Pendleton*, 3 Call, 538 ; *Miller v. Beverly*, 4 Hen. & Mun. 415, 416 ; *Beverly v. Miller*, 6 Mun. 99 ; *White's Executor v. Johnson*, 2 Mun. 285 ; *McCall v. Peasley's Adm'r*, 3 Mun. 288.

 UNITED STATES v. RICHARD LAWRENCE.

In a criminal case it is not necessary, on the part of the prosecution, to summon witnesses to the grand jury to prove the sanity of the accused, as every person is presumed to be of sound mind until the contrary is proved.
The accused has no right to send witnesses to the grand jury to prove merely exculpatory matter.

ON Monday, the 30th of March, 1835, the grand jury handed to the Court the following paper, namely :

"The grand jury beg leave to represent to the honorable Court, that Doctors Causine, Bohrer, Sewall, and Clark, were directed to be summoned to testify in the case of Richard Lawrence, (who attempted to shoot the President of the United States,) to prove the sanity or insanity of the accused. The District Attorney has told the jury that the examination of these witnesses, for that purpose, is improper.

"The jury, therefore, ask the opinion and instruction of the Court upon this point. Thomas Carbery, Foreman. March 30, 1835."

The COURT (THRUSTON, J., absent,) took time, till this day, to consider the matter, when,

CRANCH, C. J., delivered the opinion of the Court, as follows :

The grand jury having represented to the Court that several witnesses were directed to be summoned to testify in the case of Richard Lawrence, to prove the sanity or insanity of the accused, and that the District Attorney had informed the grand jury that the examination of those witnesses, for that purpose, was improper ; wherefore they asked the opinion and instruction of the Court upon that point.

The COURT is of opinion, that every person is presumed, in law, to be of sound mind until the contrary is proved ; and therefore it is unnecessary to summon witnesses on the part of the prosecution to prove the sanity of the accused ; that every man is presumed to intend to do what he does ; and is *primâ facie* responsible for his actions, and for the probable and natural consequences of them ; that if those actions are, in themselves, unlawful, the burden of proof is on the accused, to excuse or justify them ; but the accused has no right to send witnesses to the grand jury to prove mere exculpatory matter ; he must wait until he is put upon his trial ; when the petit jury is the proper tribunal to hear and decide upon the matter of defence.

If the evidence, on the part of the prosecution, shows a full *primâ facie* case of guilt, we have never known a case in which the grand jury have been permitted to examine witnesses not required on the part of the prosecution, to prove mere matter of excuse or justification. Chitty, (vol. 1, 318,) lays down the law thus : " The grand jury, in general, hear evidence only in support of the charge, and not in exculpation of the defendant ; and it has been said that they ought never to hear any other than that which is produced for the crown. But it may be doubted whether, as they are sworn to present the truth, which necessarily requires investigation, in case they may not be able to elicit truth from the witnesses for the prosecution, and are actually convinced of that circumstance, they may not require other testimony to assist them in forming their decision. The true intention seems to be that, *primâ facie*, the grand jury have no concern with any testimony but that which is regularly offered to them, with the bill of indictment ; on the back of which the names of the witnesses are inserted ; their duty being merely to inquire whether there be sufficient ground for putting the accused party on his trial before another jury of a different description. But if they are unable to satisfy themselves of the truth sufficiently to warrant their determination, they may properly seek other information relative to mere facts ; but further than this they cannot proceed." And Chief Justice McKean, in *Schaffer's case*, 1 Dal. 236, in answer to an application that witnesses might be sent to the grand jury

in behalf of the accused, said to the grand jury, "Were the proposed examination of witnesses on the part of the defendant to be allowed, the long-established rules of law and justice would be at an end. It is a matter well known and well understood that by the laws of our country, every question which affects a man's life, reputation, or property must be tried by twelve of his peers; and that their unanimous verdict is, alone, competent to determine the fact in issue. If then you undertake to inquire, not only upon what foundation the charge is made, but, likewise, upon what foundation it is denied, you will, in effect, usurp the jurisdiction of the petit jury, you will supersede the legal authority of the court in judging of the competency and inadmissibility of witnesses, and having thus undertaken to try the question, that question may be determined upon a bare majority, or by a much greater number of your body than the twelve peers prescribed by the law of the land. This point has, I believe, excited some doubts upon former occasions, but those doubts have never arisen in the mind of any lawyer, and they may be easily removed by a proper consideration of the subject; for the bills or presentments, found by a grand jury, amount to nothing more than an official accusation in order to put the party accused upon his trial; till the bill is returned there is, therefore, no charge from which he can be required to exculpate himself; and we know that many persons, against whom bills were returned, have been afterwards acquitted by a verdict of their country.

"Here then is the just line of discrimination. It is the duty of the grand jury to inquire into the nature and probable grounds of the charge; but it is the exclusive province of the petit jury to hear and determine, with the assistance and direction of the court upon points of law, whether the defendant is or is not guilty on the whole evidence for, as well as against, him; you will therefore readily perceive that if you examine the witnesses on both sides, you do not confine your consideration to the probable grounds of charge, but engage completely in the trial of the cause; and your return must, consequently, be tantamount to a verdict of acquittal or condemnation. But this would involve us in another difficulty; for, by the law, it is declared that no man shall be twice put in jeopardy for the same offence; and yet it is certain that the inquiry now proposed by the grand jury, would necessarily introduce the oppression of a double trial. Nor is it merely upon maxims of law, but I think, likewise, upon principles of humanity, that this innovation should be opposed. Considering the bill as an accusation grounded entirely upon the testimony in support of the prosecution, the petit jury receive no bias from the sanction which the indorsement of the grand jury has conferred

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upon it. But on the other hand would it not, in some degree, prejudice the most upright mind against the defendant, that on a full hearing of his defence, another tribunal had pronounced it insufficient — which would then be the natural inference from every true bill. Upon the whole the Court is of opinion, that it would be improper and illegal to examine the witnesses on behalf of the defendant while the charge against him lies before the grand jury."

In regard to the question of law submitted to this Court by the grand jury,

The COURT instructs them, that if, in any case before them, they shall be satisfied by the evidence adduced on the part of the prosecution that the party accused committed the unlawful act with which he is charged, they have no right to send for and examine witnesses to prove mere matter of justification or excuse. If such a course could be permitted it would require the United States to produce other witnesses either to discredit those thus produced on the part of the defendant, or to disprove the facts to which they are called to testify; and thus the whole trial of the cause would be drawn before the grand jury, out of the presence of the Court and of the counsel of the parties. In regard to the particular case which has been the cause of this application to the Court, we can say nothing, as we are not judicially acquainted with its circumstances. The instruction which the Court gives is intended to be general.

 UNITED STATES v. CROPLEY.

Upon an indictment at common law for assault with intent to kill and murder, the defendant may be found guilty of the simple assault only.

UPON the trial, *Mr. W. L. Brent*, for the defendant, moved the Court to instruct the jury that if they should not find the assault to be with intent to murder, they must find the defendant not guilty; 1 East, Cr. L. 411, which was a case decided by Lord Kenyon at *Nisi Prius* on an indictment in which there were two counts, namely: 1. For an assault with intent to murder. 2. A common count for assault and battery. The evidence was that if death had ensued it would have been manslaughter only; and Lord Kenyon directed the jury to find the defendant not guilty on the first count.

Mr. Key, contra, cited 1 Chitty, Cr. L. 232, 248, 250, 251; *Hunt's case*, 2 Camp. 583, and *Williams's case*, 2 Camp. 646.

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The COURT (THRUSTON, J., absent, but concurring,) refused to give the instruction; and directed the jury, that they might, if justified by the evidence, find the defendant guilty of the assault only, without the intent charged.

UNITED STATES v. RICHARD LAWRENCE.

In a case clearly bailable by law, to require larger bail than the prisoner can give, is, in effect, to refuse bail.

The discretion of the magistrate, in taking bail in a criminal case, is to be guided by the compound consideration of the ability of the prisoner to give bail, and the atrocity of the offence.

The prisoner having been fully committed for trial upon a charge of an assault upon the President of the United States, with intent to kill and murder him, the chief judge refused to issue a *habeas corpus* to bring him up for the purpose of examining witnesses to prove his insanity; and, for that cause "to discharge him from imprisonment in the common gaol, and to secure the public peace by proper restraint."

If the prisoner be acquitted by the verdict of the jury, on the ground of insanity, the Court will remand him to the custody of the marshal; on being satisfied that it would be dangerous to permit him to be at large while under mental delusion.

On the 30th of January, 1835, the prisoner, Richard Lawrence made an assault upon the President of the United States, (General Jackson,) with intent to murder him, by shooting him with a pistol as he came out of the rotunda of the capitol, after having attended the funeral service of Warren R. Davis, a member of the House of Representatives. Both pistols missed fire, although the percussion caps of both exploded, and both were well loaded with powder and ball. He was arrested in the very act, and was immediately brought before the chief judge at his chambers. The assault with intent to kill was proved by the clearest possible evidence. There was no evidence then produced of his insanity. The prisoner's manner was calm, and he seemed indifferent as to the testimony; declined cross-examining the witnesses, and when informed by the chief judge that he might make any remarks which he thought proper to make, said he could not contradict what the gentlemen had said.

After inquiring as to his property and circumstances, the chief judge said to *Mr. Key*, the District Attorney, that he supposed bail in \$1,000 would be sufficient, as it was not a penitentiary offence, there being no actual battery, and as he did not appear to have any property. *Mr. Key* seemed, at first, to acquiesce, but having conversed with some of the President's friends who stood round him, he suggested the idea that it was not impossible that others might be concerned who might be disposed to bail him, and let him escape to make another attempt on

the life of the President, and therefore thought that a larger sum should be named. The chief judge then said that there was no evidence before him to induce a suspicion that any other person was concerned in the act; that the Constitution forbade him to require excessive bail; and that to require larger bail than the prisoner could give would be to require excessive bail, and to deny bail in a case clearly bailable by law. 1 Chitty, Cr. L. 131. That the discretion of the magistrate in taking bail in a criminal case, is to be guided by the compound consideration of the ability of the prisoner to give bail, and the atrocity of the offence. That as the prisoner had some reputable friends who might be disposed to bail him, he would require bail in the sum of \$1,500. This sum, if the ability of the prisoner only were to be considered is, probably, too large; but if the atrocity of the offence alone were considered, might seem too small; but taking both into consideration, and that the punishment can only be fine and imprisonment, it seemed to him to be as high as he ought to require.

The prisoner not being able to find bail to that amount, was committed for trial, by warrant of the chief judge.

A few days afterward, namely, on the 5th of February, 1835, a petition for a writ of *habeas corpus*, signed by Mr. William L. Brent and his son as counsel for the prisoner, and supported by affidavit, was presented to the chief judge, to bring up the prisoner for the purpose of examining witnesses to prove his insanity, and that he may be discharged from imprisonment "for the cause for which he is now confined," "and that your honor do then in the premises what belongs to humanity and the unfortunate Richard Lawrence, and also to secure the public peace by proper restraint."

The chief judge having expressed a doubt of the propriety of issuing the *habeas corpus*, upon that ground, the prisoner's counsel addressed to him the following letter:

Thursday Evening, February 5th, 1835.

SIR: Since I saw you this morning I have conversed with several of our most eminent juriconsults, who are of the opinion that the case of Lawrence is a fair and proper one for an application for a *habeas corpus*, and that cases of insanity are an exception to general principles; moreover, that upon an *habeas corpus*, the judge at his chambers ought not to confine his investigation to the commitment alone, but ought to look at the cause of it; and upon looking at the Act of Congress I find it expressly declares that a judge at his chambers "shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment." If this be the object, most certainly you have the right, upon the application I have made, to inquire into the

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cause ; and if you find that the cause is the assault by an insane and deranged man, it is insufficient. I find this principle also laid down in *Bollman and Swartwout's case*, 2 Condensed Rep. 43, or 4 Cranch, 75. It is also decided, in the same case, 2 Condensed Rep. 46, at the bottom, that the writ of *habeas corpus* is, in its nature, a revision of the decision to commit for an offence ; and the Court there say, " this writ (*habeas corpus*) must always be for the purpose of revising that decision ; " (meaning the cause for the commitment.)

The application is urged by the friends of the unfortunate man, and Mr. Key states to me that he has no objection to it, and intimates an opinion that it would be but right that the *habeas corpus* should issue.

Independent of the rights of the individual, and the injustice of his present confinement, upon the grounds upon which it has been made, the committing judge not knowing of his insanity, and there being no counsel appointed to represent him at the examination, I do think that the public feeling ought to be allayed, if possible, by a true statement and understanding of the case. It is impossible the law can sanction an insane man's being confined for a crime that he is incapable of committing, when the fact of his insanity can be established without a doubt, and was not known at the time he was committed, and the insane man incapable of making it known. Such a construction of the law, I humbly conceive, would be attended by the most injurious consequences, and great oppressions might arise.

Yours most respectfully,

W. L. BRENT.

P. S. Should you refuse the *habeas corpus*, I will thank you to give your reasons on the back of the petition.

It is thought, by those who take an interest in the application, and by me also, that it may aid in another course that will be pursued ; and as it is a high privilege secured to the citizen, the refusal ought to be accompanied by the reasons.

Will you say to my son when we can call upon you again ?

WILLIAM L. BRENT.

Upon the 14th of February, 1835, the petition for the *habeas corpus* was returned to the prisoner's counsel with the following opinion :

On the petition of Richard Lawrence for a writ of *habeas corpus*.

I have attentively considered the within petition, and have taken time to look into the authorities on the subject. The petition is not accompanied by a copy of the warrant of commitment, probably because it was presumed that it was fresh in my recollection, as it was issued by myself. As well as I recollect, it states

that I had probable cause, supported by the oaths of certain witnesses therein named, to believe that Richard Lawrence, who was then before me in the custody of the marshal, had, on that day, (30th of January, 1835,) in the county of Washington, in this district, made an assault upon Andrew Jackson, President of the United States, with intent to kill him, and therefore commanded the marshal to keep him in safe custody, until he should be discharged in due course of law.

Upon the best consideration which I have been able to give to the subject, I am of opinion that I ought not to grant the prayer of the petition.

1. Because it appears by all the authorities that a writ of *habeas corpus* is not to be granted of course in the first instance, upon application merely; and the obligation to issue it ineffectually, can only exist when the commitment is so general, that the court cannot know the real occasion from the terms in which it is worded; for it is not to be awarded without some reasonable ground shown by affidavit. And in *Hobhouse's case*, 3 Barnewall & Alderson, 420, it was decided by the Court of King's Bench in England, as late as 1820, that the Court will not, in the first instance, grant a *habeas corpus*, when they see that, in the result, they must inevitably remand the party. See, also, 10 Petersdorf, 289, (Eng. ed.) *Habeas Corpus*, B, in the note; 1 Chitty, Cr. L. 118, 123, 124, and *Watkins's case*, 3 Peters, 201, where C. J. Marshall says, "the writ ought not to be awarded, if the Court is satisfied that the prisoner would be remanded to prison."

2. Because the affidavit accompanying the petition for the *habeas corpus*, does not show sufficient ground for issuing it. The only fact stated as the ground of discharge, is, the insanity of the prisoner; and, for that cause, I am requested to discharge him, and "to do what belongs to humanity" and to the prisoner, and "to secure the public peace by proper restraint."

I would remark, here, that if the prisoner is a dangerous maniac, the only manner in which I could secure the public peace (or rather secure the public safety,) would be, to remand him to the prison where he now is. His imprisonment then would be interminable; he would have no day in court; no means to compel a trial; no right to apply for a discharge for want of trial, and no right to bail. He could not be bound to keep the peace. If sureties should be bound for his keeping the peace, it is doubtful whether they could ever be liable upon their recognizances, whatever acts he might do; as I apprehend, a madman cannot be guilty of a technical breach of the peace.

I have said that I could only remand him to the prison where he now is. Unfortunately, the claims of humanity upon this sub-

ject have not yet been duly appreciated by our legislators, although they have had before them for more than thirty-four years, the example of the British Parliament, in the act of 39 & 40 Geo. 3, c. 94, which was introduced in consequence of the case of Hadfield, (who shot at the king in the theatre,) and was passed about a month after the judgment of the court in that case. That act was so framed as to reach back and cover the case of Hadfield, who had been acquitted by the jury on account of his insanity, and who had been remanded to the prison from whence he came. It was stated by the court, and admitted by the attorney-general, and the prisoner's counsel, Mr. Erskine, that, by the common law, the court might do this in such a case, but it was all they could do. They could not change the place or manner of his confinement.

Hadfield was tried on the 26th of June, 1800; and on the 30th, in the House of Commons, the attorney-general moved for leave to bring in the bill which resulted in the act of the 39 & 40 Geo. 3, c. 94. In support of his motion he observed, that, "By the common law, when a person of this kind is acquitted, the court before which he is tried, have full power to direct the safe custody of such a person; but then the law has so little regulated that custody, and is so silent as to the rules to be observed with regard to it, that it may be said to be defective in that particular."

The 1st section of the act relates to cases of treason, felony, and murder only; and is applicable as well to persons who had been already remanded upon acquittal on the ground of insanity, as to future cases. It provides that in all such cases, if evidence of insanity be given upon the trial, and the party be acquitted on the ground of insanity, and it shall be so stated by the jury, the court shall order him to be kept in strict custody, in such place, and in such manner as to the court shall seem fit until his majesty's pleasure shall be known; and that his majesty may give order for the safe custody of such person during his pleasure, in such place and manner as to him shall seem fit.

The 2d section provides, that if any person indicted for any offence, shall be insane, and shall, upon arraignment, be so found by a jury impanelled for that purpose, so that he cannot be tried; or if, upon the trial of any person, so indicted, the jury shall find him insane, the court may make a like order, as provided in the 1st section.

And if any person, charged with any offence, shall be brought before any court to be discharged for want of prosecution, and such person shall appear to be insane, it shall be lawful for such court to order a jury to be impanelled to try the sanity of such person, and if found insane, the court may make a like order.

By the 3d section, "for the better prevention of crimes being committed by persons insane," it is enacted, that if any person shall be discovered and apprehended under circumstances that denote a derangement of mind, and a purpose of committing some crime, for which, if committed, such person would be liable to be indicted, and any of his majesty's justices of the peace, before whom such person may be brought, shall think fit to issue a warrant for committing him or her as a dangerous person, suspected to be insane, such cause of commitment being plainly expressed in the warrant, the person so committed shall not be bailed, "except by two justices of the peace, one whereof shall be the justice who has issued such warrant; or by the Court of General Quarter Sessions, or by one of the justices of his majesty's courts of Westminster Hall, or by the lord chancellor, or lord keeper, or commissioner of the great seal."

It is evident, from the provisions of this act, that by the common law, a judge could not do what is asked by this petition, viz., "to do what belongs to humanity" in regard to an insane prisoner, by confining him in any other place than the common gaol, or in any other manner than as a person charged with an offence, or committed for want of giving surety for the peace or good behavior.

If, therefore, the prisoner should be brought up by *habeas corpus*, and I should remand him at all, it must be to the same custody in which he now is.

The suggestion, therefore, in the petition and affidavit, that I can, by committing the prisoner as an insane person, meliorate his condition, or change his custody, is not supported by law, and furnishes no sufficient ground for issuing the writ.

The only fact alleged in the petition and affidavit as the ground of the prisoner's discharge, is his insanity at the time of committing the act; which fact was not made known at the time of his commitment, but can now be proved by witnesses whose names are indorsed on the petition.

After a diligent search, I have found no case in which a court or a judge has, upon *habeas corpus* sent for and examined witnesses on the part of the prisoner, to prove exculpatory matter, or any other matter, when the warrant of commitment was regular, and bore upon its face sufficient cause of commitment. Matter of defence must, after commitment, be left for the jury. The judge cannot try the cause upon *habeas corpus*. The matter of the return must be taken to be true. The utmost extent to which courts have gone, upon *habeas corpus*, is to examine the depositions taken by the committing magistrate, upon the examination of the party under the statutes of Philip and Mary, in order to see whether the party may be admitted to bail.

In the case of *Bollman v. Swartwout*, 4 Cranch, 75, the Supreme Court, upon *habeas corpus*, examined the depositions taken upon the motion to commit; the same having been referred to in the order for commitment, and brought up by *certiorari* as part of the record; but it was never suggested that that court could receive new evidence.

Chitty (1 Chitty, Cr. L. 89,) says: "In modern practice, though exculpatory evidence is received at the instance of the prisoner, and certified with the other depositions," (and therefore taken before commitment,) "unless it appear in the clearest manner that the charge is malicious, as well as groundless, it is not usual for the magistrate to discharge him, even when he believes him to be altogether innocent."

In 1 Leach, Cr. L. 270, (10 Petersdorf, 284,) it is said, "The court will look into the depositions to see if there be sufficient ground laid to detain the party in custody, and if there be not, they will bail him."

Chitty (1 Chitty, Cr. L. 130,) says, "It is, in fact, to the depositions alone, that the court will look for their direction; for when a felony is positively charged, they will refuse to bail, though an *alibi* be supported by the strongest evidence. (2 Str. 1138.) Nor will the court at all admit of extrinsic evidence; so that they refused to examine whether a man brought up before them, had been previously acquitted of a charge precisely similar. (2 Str. 851.) And the court refused to bail a person for receiving stolen goods, the defendant's affidavit admitting the receipt of the goods, but denying that he knew they were stolen, because that was a fact triable only by a jury; and it would be of dangerous consequence to allow such proceedings, as it might induce prisoners generally to lay their case before the court, who, instead of the jury, would be called upon to try the truth of the fact for which they were committed." (Cases, K. B. 96.)

1 Salk. 104. On an indictment for murder, the prisoner moved to be bailed. "Rokesby and Turton were for bailing him, because the evidence upon the affidavits read, did not seem to them sufficient to prove him guilty. Holt, C. J., and Gould, *contra*. The evidence does affect him, and that is enough. The allowing the favor of bail may discourage the prosecution; therefore it is not fit the court should declare their opinion of the evidence beforehand; for it must prejudice the prisoner on the one side, or the prosecutor on the other."

Mr. Chancellor Kent, in his Commentaries, (vol. 2, p. 26,) says, "Upon the return of the *habeas corpus*, the judge is not confined to the face of the return, but he is to examine into the facts contained in the return, and into the cause of the imprisonment, whether the commitment be for any criminal or supposed criminal matter, or not.

"This power of revising the use of commitment is given by the act of this State," (New York,) "and it authorizes the judge to reëxamine all the testimony taken before the magistrate who originally committed, and to take further proof on the subject, for he is to examine into the facts; and it is a new power, not found in the English statute."

If I were to examine the witnesses now offered by the friends of the prisoner to prove his insanity, I should feel myself bound to give notice to the Attorney of the United States, and summon witnesses on the part of the prosecution, which would lead to the trial of the whole cause without a jury. No such case has been found in all my researches, and the impropriety of it seems too evident to admit of argument.

But if I could, in any case upon *habeas corpus*, hear witnesses for the prisoner, it seems to me that the case of insanity would be an exception. The fact charged in the commitment being proved to the satisfaction of the committing magistrate, the allegation of insanity is matter of defence or excuse proper for the consideration of the jury, who are the judges of the fact.

Every person, of the age of discretion, is presumed to be of sane memory unless the contrary be proved.

It is a very nice point to decide what degree of insanity will render a person irresponsible for his acts; and it is the peculiar province of the jury to say whether the prisoner's insanity is of that degree.

If, therefore, the witnesses were to satisfy me that the prisoner was insane it would be impossible for me to say that the jury also would be satisfied that the insanity was of such a degree as rendered the prisoner wholly irresponsible. In such a case I could not discharge him; and it is very doubtful whether I could bail him, as he could not bind himself in a valid recognizance; and I am not certain that the sureties of a madman would be held bound to produce him; and if they were, yet surety of the peace or good behavior would be wanting; the validity of which, if given, would be still more doubtful, as before suggested.

Lord Hale, (1 H. H. P. C. 32, 33,) speaking of insanity, says, "Now, touching the trial of this incapacity, and who shall be adjudged in such a degree thereof as to excuse from the guilt of capital offences, this is a matter of great difficulty, partly from the ease of counterfeiting this disability when it is to excuse a *nocent*, and partly from the variety of degrees of this infirmity, whereof some are sufficient and some are insufficient to excuse persons in capital offences. Yet the law of England hath afforded the best method of trial, that is possible, of this and all other matters of fact, namely, a jury of twelve men all concurring in the same

judgment, by the testimony of witnesses, *vivâ voce*, in the presence of the judge and jury, and by the inspection and direction of the judge." "Therefore, the trial of the incapacity of the party indicted or appealed of a capital offence, is upon his plea of not guilty, by the jury upon his arraignment, who are to inquire thereupon touching such incapacity of the prisoner, and whether it be to such a degree as may excuse him from the guilt of a capital offence."

And in page 34 he says, "If a man, in his sound memory, commits a capital offence, and before arraignment he becomes absolutely mad, he ought not by law to be arraigned during such frenzy; but be remitted to prison, until that incapacity be removed."

And in page 35 he says, "If a person of non-sane memory commit homicide during such his insanity, and continue so to the time of his arraignment, such person shall neither be arraigned nor tried, but remitted to gaol, there to remain in expectation of the king's grace to pardon him."

"But it seems in such a case it is prudence to swear an inquest, *ex officio*, to inquire touching his madness, whether it was feigned, and thus it was done in 3 Ed. 3, and in *Somerville's case*, Anderson's Rep. part 1, No. 154.

"But in case a man, in a frenzy, happen, by some oversight, or by means of the gaoler, to plead to his indictment, and is put upon his trial; and it appear to the court, upon his trial, that he is mad, the judge, in his discretion, may discharge the jury of him, and remit him to gaol, to be tried after the recovery of his understanding, especially if any doubt appear upon the evidence touching the guilt of the fact, and this *in favorem vitæ*. And if there be no color of evidence to prove him guilty, or if there be pregnant evidence to prove his insanity at the time of the fact committed, then, upon the same favor of life and liberty, it is fit it should be proceeded in the trial, in order to his acquittal and enlargement."

Upon the whole, therefore, being perfectly satisfied that I have no authority to discharge the prisoner upon the alleged ground of insanity, if it were established; and that if brought up by *habeas corpus* he must be immediately remanded, it seems to me that it would be useless to issue the writ, and that it is my duty to refuse it.

W. CRANCH, (February 14, 1835.) On the 11th of April, 1835, the cause came on for trial before the Circuit Court. The indictment was at common law, for an assault upon Andrew Jackson, President of the United States, with intent to kill and murder him.

Mr. Key, for the United States, admitted the law respecting

Greer v. Nourse.

insanity to be correctly stated by Mr. Erskine in *Hadfield's case*, 27 State Trials, p. 1300, &c.

The fact that the prisoner was under a mental delusion, in supposing himself to be King of England, and of the United States as an appendage to England, and that General Jackson stood in his way in the enjoyment of his right, and that the act was done under that delusion, was fully proved; and the jury, in five minutes, returned the following verdict: "We find the prisoner not guilty; he being under the influence of insanity at the time he committed the act."

The COURT (THRUSTON, J., absent,) remanded the prisoner, being of opinion, from the evidence, that it would be extremely dangerous to permit him to be at large while under this mental delusion.

The proceedings and evidence upon this trial are more fully reported in the National Intelligencer of Monday the 13th of April, 1835.

DOYLE v. RICHARDS.

THE COURT quashed an attachment issued upon one *non est* returned upon a justice's warrant for a small debt; the defendant being a resident of the district. See the Acts of Maryland, 1791, c. 68, § 1, and 1715, c. 40. Two *non ests* were necessary.

MCDERMOTT v. NAYLOR.

A replevin discontinued at March term, 1834, by negligence of the clerk, was reinstated at March term, 1835.

REPLEVIN: discontinued at March term, 1834, for want of appearance by the defendant.

Mr. Hall, for defendant, moved to reinstate it on the docket; on the ground that he had directed the clerk to enter his appearance for the defendant at March term, 1834, which he neglected to do. See *Williamson v. Bryan*, April, 1823 (2 Cranch, C. C. 407); and *French v. Venable*, December, 1824, in this Court (Id. 509.) Reinstated.

WILLIAM GREER v. JOHN R. NOURSE.

The plea of no rent arrear admits the demise as laid in the avowry.

REPLEVIN: avowry for rent arrear. Plea, no rent arrear, and issue.

Channing v. Reiley.

Mr. R. S. Coxe, for the plaintiff, contended at the trial, that the defendant must prove his title and the demise laid in the avowry.

Mr. Bradley, for the defendant, cited 4 Starkie on Ev. 1297.

The COURT (*nem. con.*) decided, that the plea of no rent arrear admits the demise as laid in the avowry.

CHANNING v. REILEY.

This Court will give to a discharge under the insolvent law of a State, the same effect here, as it would have in the State in which it was granted.

Mr. Bayard Smith, for the defendant, moved to enter his appearance without special bail, the defendant having been discharged under the insolvent law of New York.

Mr. Wallach, *contrà*, stated that this action was brought upon a judgment recovered in Ohio, by the plaintiff, who was then a citizen of Connecticut. The discharge produced by the defendant, was under the insolvent law of New York.

Mr. Wallach cited *White v. Canfield*, 7 Johns. 117; *Licard v. Whale*, 11 Id. 194; *Hayton v. Wilkinson*, 1 Hall's Amer. Law Journal, 260; *Whittemore v. Adams*, 2 Cow. 626; *Jones v. Allen*, 1 Dall. 188; *Park v. Hozier*, 14 Johns. 346; S. P. 2 Wash. C. C. R. 157; *Sherril v. Hopkins*, 1 Cow. 103; *Sturges v. Crowningshield*, and *McMillan v. McNeil*, 4 Wheat. 122, 209; *Van Raugh v. Van Arsdale*, 3 Caines, 154; *Campbell v. Claudius*, 1 Peters, C. C. R. 484.

Mr. Smith cited 1 Har. & J. 101; *Richmond v. De Young*, 3 Gill & J. 66; and *Pennington v. Wright*, 9 Johns. 325.

CRANCH, C. J. The decisions in the several State courts, and in the circuit courts of the United States have been various.

This Court has always uniformly followed the decisions in the State courts of Pennsylvania and Maryland, as they stood at the time of the first case in which the Court was called upon to decide upon the effect of a discharge under the insolvent law of one of the States.

The rule adopted by this Court, and from which it has never departed, is to give the discharge the same effect here that it would have in the State in which it was granted.

The COURT thought that this rule was not only sanctioned, but required, by the first section of the fourth article of the Constitution of the United States, which declares that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State;" and by the Act of Con-

gress of the 26th of May, 1790, [1 Stat. at Large, 122,] which declares that they "shall have such faith and credit given to them in every court within the United States, as they have, by law or usage, in the courts of the State from whence the said records are, or shall be, taken.

This Court, to be consistent, must adhere to the rule thus adopted, and sanctioned by thirty years' practice, until a different rule shall have been authoritatively settled by a superior tribunal.

The question then, is, whether this discharge, under the law of New York, which is now produced by the defendant, would have protected him from arrest, or would have entitled him to appear without special bail, if this action had been brought in that State.

None of the cases cited by *Mr. Wallach* show that it would not. They were all, except *Sherril v. Hopkins* and *Campbell v. Claudius*, cases of discharge under laws of other States; not of the State in which the defendants were arrested and sought to avail themselves of the benefit of the discharge.

In the case of *Sherril v. Hopkins*, the question was not whether the defendant should appear without bail, but whether the contract itself was discharged. Neither that case, nor the case of *Sturgis v. Crowningshield*, nor *McMillan v. McNeil*, touches the present question.

In the case of *Campbell v. Claudius*, 1 Peters, C. C. R. 494, Mr. Justice Washington said, "It is true that the courts of the State where the discharge is given may be bound to discharge on common bail, no matter where the debt was contracted; but the federal courts, or the courts of other States, are under no such obligation; and they ought not, on the ground of comity, to give it effect in their courts. The State laws as to rights, furnish rules of decision for the federal courts, under certain qualifications; but as to remedies, they have no binding force in those courts."

This decision applies only to the court in which it was made, and is no authority elsewhere. What he says of the obligation of the State courts, is but a *dictum*; and it only denies the obligation, not the discretion of those courts, to admit the defendant to appear on common bail.

The cases, referred to by the plaintiff's counsel, are cited to show that the long course of cases in which this Court has uniformly decided that they will give the same effect to a discharge under the insolvent law of a State which would be given to it by the courts of the State in which it was obtained, should be overruled. Some of the cases cited show that the creditor cannot be affected by an insolvent law of a State to whose jurisdiction he

has not subjected himself, so far as the rights of the creditor are concerned ; but none of them go so far as to say that if he resorts to the courts of that State, he is not bound by its laws, so far as his remedy is concerned. Nor is it denied in any of them that it is competent for a State court, or for this Court, which exercises jurisdiction analogous to that of a State court, to permit a defendant to appear on common bail, who has surrendered all his property, and whose person has been thereupon discharged under an insolvent law of one of the States.

In *Byrne v. Carpenter*, (1 Cranch, C. C. 481,) this Court at December term, 1807, or 1808, decided upon demurrer, that the discharge of the principal under the insolvent law, before the return of the *ca. sa.* was a good discharge of the bail. See also *Sears v. Noon*, June, 1820, (2 Cranch, C. C. 220) ; *King v. Sim*, April, 1821, (2 Cranch, C. C. 234) ; *Jones v. Lear*, April, 1824 ; *Robert Bailey's case*, 1821, and the cases cited in *King v. Sim*.

We are informed also that the Supreme Court of the United States, at its last session, decided, in a case not yet reported, that the circuit courts of the United States are bound to give the same effect to an insolvent discharge which a court of the State in which the Circuit Court sits, would give to it. But however this may be, the rule of this Court, as before stated, has been long established ; and as there is no reason to doubt that if this suit had been brought in a State court in New York the defendant would have been permitted to appear upon common bail, (9 Johns. 325,) we must permit him so to appear in this Court. When arrested in New York he was obliged to surrender all his property, wherever situated, before he could be discharged. An arrest is no satisfaction in itself. It is only the means of compelling the defendant to do what he has already done, that is, to surrender his property. If he cannot avail himself of this surrender, and if he should be arrested in a place where there is no insolvent law, as he would have neither property nor credit, the consequence might be perpetual imprisonment.

I am, therefore, of opinion that the defendant should be permitted to appear without special bail.

MORSELL, J., concurred with the Chief Justice in the result of his opinion, but stated it as his opinion that where the discharge was not obtained in the State where the contract was made, the courts of another State could not permit the defendant to appear without special bail.

HAMILTON v. P. A. CARNES.

An offer by the defendant to the plaintiff's agent, after the commencement of the suit, to pay the debt in a manner and upon terms which he was not authorized to accept, is not a sufficient promise to take the case out of the statute of limitations.

ASSUMPSIT on two promissory notes. Plea, limitations. General replication and issue.

Mr. Nathan Smith, a witness for the plaintiff, upon the trial testified, that in a conversation with the witness, who was the agent of the plaintiff, the defendant said that if he would withdraw this suit he would give the witness an order on his partner at New Orleans for the amount ; but the witness was not authorized to dismiss the suit upon those terms.

Mr. Morfit, for the defendant, contended that this was not a sufficient promise to take the case out of the statute of limitations, and cited *Reed v. Wilkinson*, 2 Wash. C. C. R. 514, and *Bell v. Morrison*, 1 Peters, 351.

Mr. Fendall, *contrà*, cited *Wetzel v. Bussard*, 1 Wheat. 309.

The COURT (THRUSTON, J., absent,) upon the authority of *Bell v. Morrison*, and because the new promise was made after the commencement of this suit, were of opinion, and instructed the jury, that the defendant's promise so made, did not take the case out of the statute of limitations.

BROOKLYN WHITE LEAD COMPANY v. J. PIERCE.

A plea of misnomer, in abatement, is too late after the expiration of the rule to plead. The plaintiff, in a joint action against two defendants, may, of right, at the trial term, amend his declaration by suggesting the proceeding by two *non ests* against the defendant who has not been taken.

THE rule to plead expired on the first Monday in November, 1834. Mr. Hall, for the defendant, in January, 1835, pleaded misnomer, in abatement.

The COURT said it was too late, and rejected the plea ; and refused to continue the cause, or to permit the defendant to plead *de novo*, as of right.

Mr. Bradley, for the plaintiff, then moved to suggest in the declaration the proceeding by two *non ests* against the joint defendant who had not been taken.

The COURT (*nem. con.*) said, it was an amendment of course, and no leave of the Court was necessary.

WALLAR v. STEWART'S EXECUTRIX.

It is not too late, after the jury is sworn, to call for the books which the Court has ordered to be produced at the trial. If the party, calling for the books, inspect them, he makes them evidence for the other party.

If the witness is protected from liability by the act of limitations, he is a competent witness without a release from the party to whom he was liable.

ASSUMPSIT for \$116.30, for lumber sold and delivered.

The defendant had obtained an order of the Court upon the plaintiff, to produce, upon the trial, his original book of entries.

After the jury was sworn the defendant called for the book. The plaintiff's counsel, *Mr. Bradley*, refused to produce it, although he had it ready; saying that the call was too late after the jury was sworn, and cited *Geyger v. Geyger*, 2 Dal. 332.

Mr. Morfit, *contrà*, cited the Judiciary Act of 1789, § 15, [1 Stat. at Large, 73]; *Ashley v. Blight*, 1 Peters, C. C. R. 15, and *Kenney v. Van Horne*, 1 Johns. 394.

The COURT (*nem. con.*) was of opinion that the motion for *non-pros* for not producing the book, was not too late. The book was then produced.

Mr. Bradley then gave notice to the defendant's counsel, that if they inspected the books he should claim the right to use them as evidence for the plaintiff, and cited *Jordan v. Wilkins*, 2 Wash. C. C. R. 483.

The COURT (CRANCH, C. J., and MORSELL, J., hesitating, and thinking there were contrary decisions on the point,) decided that if the defendant's counsel inspected the book he made it evidence for the plaintiff.

Mr. Morfit then refused to inspect it.

Mr. Peter Kurtz was then offered as a witness for the plaintiff and was about to testify that he was employed by Stewart, and got the lumber on his credit.

Mr. Brent, for the defendant, objected that the witness was interested; but it appearing that he was protected by the statute of limitations, he was permitted to testify without a release from the plaintiff.

NOTE. Upon the question whether the calling for and inspecting the books of the opposite party authorizes him to read them in evidence, if the party calling for them refuse to use them, see the following cases in this Court: *Banks v. Miller*, June, 1809, (1 Cranch, C. C. 543); *Lindsey v. Riggs*, December, 1811; *Clementson v. Williams*, June, 1812, and *Coote & Jones v. Bank of United States*, December, 1826, (Id. 50.)

BANK OF THE UNITED STATES v. RICHARD DAVIS.

An indorsement to the cashier of a bank is virtually an indorsement to the bank; and may be so declared upon. A memorandum in the handwriting of a deceased note-clerk of a bank that he had delivered a certain notice, may be read in evidence in favor of the bank.

ASSUMPSIT, upon R. Wright's draft on Jenkins, of Baltimore, in favor of the defendant, R. Davis, by him indorsed in blank, and by Richard Smith, cashier of the office of the Bank of the United States in Washington, to White, cashier of the office of the Bank of the United States in Baltimore. The declaration stated, that Richard Smith indorsed the bill to the plaintiffs, (the Bank of the United States,) without noticing White, to whom the said R. Smith had indorsed it.

Mr. Redin, for the defendant, objected that there was no indorsement. But, it having been proved that Mr. Smith was, merely the cashier of the plaintiffs' office here, and Mr. White the cashier of the plaintiffs' office in Baltimore,

The COURT (*nem. con.*) was of opinion that the indorsement was virtually to the plaintiffs.

The plaintiffs then offered in evidence a notice signed by the Baltimore notary-public addressed to Mr. Richard Smith, the last indorser, upon the back of which was an indorsement to this effect: "A similar notice delivered to Richard Davis by me, John S. Nevius, January 2d, 1833;" and proved that Nevius is dead. That on the said 2d of January, 1833, he was what is called a note-clerk in the bank, and occasionally delivered notices of this kind; but they were more generally given by other officers, called messengers.

The defendant's counsel objected that such memorandums are not evidence unless made by a person whose usual business is to do what he certifies he has done.

But the COURT (*nem. con.*) permitted it to be read in evidence to the jury.

Verdict for the plaintiff, \$2,298.

McCANDLESS v. McCORD.

In a joint action against two defendants, after judgment confessed by one of the defendants, it is too late for him to move to set aside the judgment because the *capias*

Wright v. Corporation of Georgetown.

ad respondendum was not renewed and regularly returned *non est inventus*, at every term until the trial term of the case against the defendant taken. The practice in such cases is unsettled.

THIS was a motion by *Mr. Key*, for the defendant, to quash the *ca. sa.* against McCord, and to set aside the judgment, which had been confessed by him, saving his equity. The original *capias ad respondendum* was against McCord and Salady. McCord was taken but Salady was returned *non est*; and the writ was not renewed against him; nor does the declaration state that the first writ was returned *non est* as to him. Upon examination of the records of this Court, it appeared that the practice was unsettled. Of 117 cases, from 1801 to 1814, in 56 cases the writ was not renewed against the absent defendant; and in 61 it was renewed.

Mr. Key, for the defendant, cited the case of *Nicholls v. Fearson*, in this Court at December term, 1824, (2 Cranch, C. C. 526,) in which the Court decided, (*nem. con.*) "that the *capias* must be continued by *alias* and *pluries* up to the trial court," and that for want of such continuance the cause was discontinued, and ordered to be stricken off the docket; but, at the suggestion of *Mr. Key*, that in Harris's Entries one *non est* only is mentioned, the Court agreed to hear a motion to reinstate the cause, if *Mr. Key* should think he could sustain the motion, but nothing further appears to have been said upon that point; the cause, however, was afterwards tried and was carried to the Supreme Court, upon a question of usury.

Mr. Redin, for the plaintiff, *contra*, contended that after a confession of judgment by the defendant taken, it is too late for him to object to the want of a renewal of the *capias ad respondendum*, against the other defendant.

And of that opinion was the COURT, (THRUSTON, J., absent,) and the motion to set aside the judgment was overruled.

MATTHEW WRIGHT v. CORPORATION OF GEORGETOWN.

A subsequent inquisition is no bar to the plaintiff's special action upon the case for a cause of action which accrued before the inquisition. The power to regulate streets, given by the Act of 1805, applies only to streets opened or extended by virtue of that act. The inquest must be taken before a magistrate or officer. The justice must certify that he summoned the jurors, and that they were sworn. The jurors must certify that they made the inquest. The party to be affected by the inquest must be notified.

THIS was a special action upon the case for damages to the

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plaintiff's dwelling-house, by graduating the street and raising the earth so as to obstruct the plaintiff's entrance, &c.

The declaration, which was drawn by *Mr. Jones*, consisted of two counts; the first of which stated, in substance, that the plaintiff was seized in fee of a messuage and tenement, in Georgetown, D. C., fronting on Causeway street, which, long before the injury now complained of, had been regulated and improved, so as to admit of convenient access, ingress, egress and regress to and from the said messuage and tenement and the said street; and to leave the ground-floor of the dwelling-house on a convenient level above the level of the street; the regulation and level of which street, the defendants, at the time aforesaid, and before and always since, had no lawful right to change and alter, so as to obstruct such access, &c.; yet the defendants afterward, unlawfully and wilfully, against the will of the plaintiff and without any lawful warrant, power, or authority, caused the regulation and level of the said messuage and tenement to be changed and altered and the said street all along the front of said messuage and tenement, to be raised and filled up and embanked with earth, to a great height, namely, fifteen inches above its proper level as before laid out, regulated, and levelled by public authority and the acts of said defendants, so as to impede and obstruct all access, &c., and to render the dwelling-house untenable and uninhabitable for one year and upwards, to the great nuisance, &c., of the plaintiff and his tenants; by reason whereof the plaintiff was obliged to raise the ground-floor fifteen inches above its former level, and to make other works and repairs, &c., at the expense of \$600, and lost the rents and profits, &c., to the damage of the plaintiff \$2,000, &c.

The second count stated that the damage was done without compensation as required by the act of Congress.

The defendants pleaded,

1st. In substance, that the plaintiff is concluded by the verdict of the jury, held under the town charter, and that the sum, there awarded, was tendered to, and refused by, the plaintiff.

2d. That the plaintiff's house was built before the street was graduated, and therefore no injury.

3d. Not guilty.

Mr. Jones, for the plaintiff, prayed the Court to instruct the jury that the matter of the plea is no defence to this action.

Mr. Dunlop, for the defendants, *contra*, contended that the inquiry is conclusive, and cited the Maryland charter of Georgetown, 1797, c. 6; the Act of Congress of March 3d, 1805, [2 Stat. at Large, 332,] Davis's Laws of D. C. 171; the Act of Congress of 1809, March 3d, [2 Stat. at Large, 537,] Davis's Laws of D.

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C. 195, § 4, p. 196, 197; and the case of *Gozler v. Corporation of Georgetown*, 6 Wheat. 596.

Mr. Jones, contra, the Act of Congress of the 3d of March, 1809, § 4, [2 Stat. at Large, 537,] authorizes the regulation only of those streets which, either under the powers given by that act or by previous acts, the corporation might thereafter open or extend. This was an old street (Water street,) and had been twice regulated, and had been built upon for many years. The justice and the jury had no authority in this case under that act. It is said that if they had, this Court has not. But in *Pritchard's case*, (December, 1819, (2 Cranch, C. C. 191,) it was decided that this Court had the jurisdiction; therefore the justice and jury had not. There is no law that ousts this Court of its jurisdiction. This is not taking private property for public use. The damage was done before the inquisition, and therefore the plaintiff has not lost his common-law remedy. By the fourth section of the Act of 1809, [2 Stat. at Large, 537,] the justice and twelve jurors are to be corporators and the authority is confined to the precise case mentioned in that section. The Act of Maryland of 1797, c. 6, did not give the right to open and extend streets, but only to make by-laws for the graduation and levelling of existing streets. The Act of Maryland of 1789, only gives the corporation the power to survey and ascertain the streets, lanes, and alleys of the town and its additions, and they could not survey, lay out, or alter any new street except upon the application and at the expense of the proprietor through whose ground it should run; and no street was to be extended through the ground of any person without his consent.

The Act of Congress of the 3d of March, 1805, § 12, [2 Stat. at Large, 332,] authorizes the corporation, "to open, extend, and regulate streets within the limits of the said town; provided they make to the person or persons who may be injured by such opening, extension, or regulation, just and adequate compensation, to be ascertained by the verdict of an impartial jury, to be summoned and sworn by a justice of the peace of the county of Washington, and to be formed of twenty-three men who shall proceed in like manner as has been usual in other cases where private property has been condemned for public use."

Mr. Jones contended that the Acts of 1805, and 1809, are applicable to the same cases; and that the compensation was to be ascertained before the street could be regulated; and therefore that the plaintiff was not bound by the inquisition.

In all cases of *ad quod damnum*, the damages are to be first ascertained; and it is usual to give notice to the party to be affected by the condemnation; and in the warrant to describe the property intended to be taken.

In the present case, the warrant is not directed to anybody. The jury was sworn to ascertain what damage has been done to the property holders on Water street between Congress and Washington streets.

There is no certificate of the justice that this is the inquisition. The certificate of the jurors is not sufficient.

Mr. Key, in reply. No warrant was required by law. The justice might have summoned the jury *ore tenus*. But he issued a blank summons, and the inquisition states that "We, A, B, C, &c., jurors duly summoned, as appears by the warrant hereto annexed," &c.

The jury describe particularly the property to which the damage was done which they assess. It was not necessary to describe it more specifically. It was not necessary that there should be a separate warrant for each proprietor whose property was damaged. The law does not require the justice to certify any thing; and his certificate would have been good for nothing if he had certified. The amount of the damage could not be as well ascertained before, as after it was done.

The COURT (*THRUSTON, J. contra*,) was of opinion, and instructed the jury that the inquisition, and the proceedings thereon, were no bar to the plaintiff's action:

1. Because the compensation should be ascertained before the defendants could lawfully raise the level of the street.

2. Because the power to regulate, given by the Act of 1805, applies only to the streets opened or extended by virtue of that act.

3. Because the inquest was not taken before any magistrate or officer.

4. Because it is not certified by the justice that he summoned the jurors.

5. Because he has not certified that the jurors were sworn by him, nor that they made an inquest; nor that the plaintiff had notice, &c.

Verdict for the plaintiff, \$160.

ELIZABETH LOWE v. STOCKTON & STOKES.

The owners of a stage-coach are liable for the negligence of their agent in suffering the plaintiff's slaves to be taken away in their coach; but not if the agent has used all the diligence which is customary and usual in similar cases.

THIS was an action upon the case for permitting the plaintiff's slaves to be carried away in the defendant's stage-coach.

The slaves were colored persons. A decent, respectable-looking white woman, who gave her name as Powell, came to the stage-coach office of the defendants in the morning of that day, or the day before, and told the office-keeper that she wished to take seats for two of her servants, and that they would be there at the time of the departure of the evening stage-coach; and she paid for their passage. The servants came at the time and said they were the persons for whom Mrs. Powell had paid the passage; and they were permitted to take their seats.

The COURT, at the prayer of *Mr. Key*, for the plaintiff, instructed the jury, as in *Cookenderfer's case*, at December term, 1827, (3 Cranch, C. C. 257,) that if they believe, from the evidence, that the slaves of the plaintiff were taken away, without her consent, in the stage-coach of the defendants, and that the agent of the defendants, by using due and reasonable diligence, could have prevented their being so taken away, and that the said agent did not use such due and reasonable diligence, then the defendants are liable.

And, at the prayer of *Mr. Coxe*, for the defendants, further instructed them, that if they should believe from the evidence that the defendants' said agent used all the diligence which is customary and usual in similar cases, then the plaintiff is not entitled to recover.

Verdict for the plaintiff, \$200.

But a new trial was granted upon new evidence discovered, that the woman, who paid for the seats of the slaves, was not named Powell, but Howard, and was the sister of the plaintiff, and resided with her.

Saturday, May 2d, adjourned to the 4th Monday in May.

CIRCUIT COURT OF THE UNITED STATES.

MAY TERM, 1835, AT ALEXANDRIA.

UNITED STATES *v.* HENRY FRYE, a Slave.

An indictment for manslaughter, need not contain the words, "in the fury of his mind."

The jumping on board of a boat, then in custody of the prisoner, after being warned not to do so, and with intent to do the prisoner some great bodily harm, and actually assaulting him with such intent, and putting the prisoner in fear of such great bodily harm, will excuse the homicide; but the jumping on board the boat, under the circumstances stated, was not an actual assault on the prisoner, who was fifteen feet from the deceased at the time of the shooting.

A slave, convicted of manslaughter, is, by the law of Virginia, and of the District of Columbia, to be burnt in the left hand and publicly whipped.

THIS was an indictment against a slave for the manslaughter of Robert Jackson.

Verdict, guilty.

Motion in arrest of judgment, and for a new trial.

Mr. Brent, for the prisoner, contended that the indictment was defective in not averring that the act was done by the prisoner "in the fury of his mind."

It was an indictment for murder, changed to one for manslaughter, by striking out the allegation of malice prepense, and the word "murdered."

The Court (*nem. con.*) overruled the motion in arrest of judgment, but granted a new trial, (*THRUSTON, J., contra*), upon the doubt whether the circumstances did not excuse the homicide.

Upon the new trial, the circumstances, as they appeared in evidence were these :

Jackson, the deceased, and one Nightengale, had beaten the prisoner severely on shore, who escaped from them and fled to his master's boat, which was then in his custody, and under his command, by the authority of his master. They followed him down to the wharf, and Jackson dared him to come on shore, that he might lay his hands on him again.

Taylor v. Buckner.

The prisoner refused, and told Jackson to stand off, and not to come on board ; and if he did, he would shoot him. The warning and threat by the prisoner were repeated. Jackson said, "shoot and be damned," and jumped on board. The prisoner, who was standing with a gun in his hand at his cabin door, about fifteen feet from Jackson when he jumped on board, instantly shot and killed Jackson.

The COURT, at the prayer of the prisoner's counsel, instructed the jury, (THRUSTON, J., *contrà*,) that if they should be satisfied, by the evidence, that the prisoner was and is a slave, and at the time when, &c., had the custody and command of the boat in which, &c., by the authority of his master ; and that the deceased, Jackson, entered upon the boat after being warned by the prisoner not to do so, and with intent to do a great bodily harm to the prisoner ; and, after being in the boat, actually assaulted the prisoner with intent to do him such great bodily harm ; and that the prisoner had good ground to apprehend, and did fear, that the said Jackson would do him such harm, and that the prisoner then killed the said Jackson by shooting him, &c., such killing amounted only to excusable homicide.

And also, at the prayer of the counsel for the United States, instructed the jury (MORSELL, J., doubting,) that the jumping on board the boat, under those circumstances, was not an actual assault by the deceased, Jackson, on board of the boat.

MORSELL, J., thought that the assault and beating on shore, and the following of the prisoner to the boat, and the threats used by Jackson on the wharf, at the time he jumped on board, evincing the continued purpose of again beating the prisoner, were sufficient evidence of an assault on board of the boat.

The jury could not agree, and by consent were discharged, and the cause continued to the next term, when the prisoner was again tried and convicted.

It being stated and admitted that the prisoner is a slave, the sentence was, "that he be burnt in the left hand, and publicly whipped with twenty-five stripes."

See the Act of Congress of March 3, 1801, supplementary to the Act concerning the District of Columbia, § 3, [2 Stat. at Large, 115,] and the Act of Virginia of December 17, 1792, c. 103, § 24, p. 190 ; and the case of *United States v. Clark*, in this Court, at November term, 1825, (2 Cranch, C. C. 620.)

NEGRO CHARLES TAYLOR v. ARISS BUCKNER.

An importation of slaves by a person who has only a life estate in them is an importation within the Maryland act of 1796, c. 67, § 1 ; and the consent of the rever-

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sioner to the importation is not necessary to give freedom to the slaves thus imported.
The question of the intent with which the importation is made is for the jury.

PETITION FOR FREEDOM by Negro Charles Taylor, and others; six cases; removed from Washington to Alexandria county for a fair trial.

The petitioners claim freedom by reason of their importation from Virginia into the county of Washington "to reside," contrary to the Maryland Act of 1796, c. 67, § 1.

Mr. Taylor, for the defendant, having offered evidence that some of the petitioners, namely, Fanny and her children, were the property of the defendant for the life of his wife only, prayed the Court to instruct the jury, that the importation of those petitioners by the defendant could not give them any right to freedom under the first section of the Maryland Act of 1796, c. 67; and cited *Negro Sally v. Ball*, 1 Wheat. 1; and the Virginia Law of 1819, §§ 48 and 49, 2 Rev. Co. 431.

But the COURT (MORSELL, J., not having heard the argument, gave no opinion,) refused to give the instruction.

Mr. Taylor, then prayed the Court to instruct the jury that such importation, without the consent of the reversioners, could not give those petitioners a right to freedom under the first section of the Maryland Act of 1796, c. 67, which the Court still refused to give, notwithstanding the case of *Negro Sally v. Ball*, 1 Wheat. 5, considering the words, "since it is the property of the person importing the slave which is forfeited," as dictum only; that point not being necessary to the decision of that cause, the slave in that case not having been brought in to reside or for sale, but only for a year's service, and having been, in the course of the year, carried back to Virginia.

Mr. Key, for the petitioners, contended that the hiring out in Washington of the slave of a non-resident, for more than a year, is evidence that the bringing in was "to reside," contrary to the first section; and that it had been so decided by this Court.

Mr. Jones denied it; and appealed to the Court.

The COURT (*nem. con.*) said that they did not recollect any such decision; but that the question was always left open to the jury, as to the intent with which the importation was made.

SALLY MARIA PYE AND EDWARD ARELL PYE v. JOHN J. JENKINS *et al.*

Bill in equity to set aside a deed from a young daughter to her father, of all her estate; of which he had a life estate as tenant by the curtesy; held that the deed

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should be set aside in equity, both on the ground of the relation of the parties ; and the conveyance being of a reversion, to the party who had the life estate, and without valuable consideration.

THE complainants, infants, by their father and next friend, James B. Pye, allege, that a share of the real estate of Richard Arell, in the county of Alexandria, D. C., and in Virginia, descended to their mother Eleanor, the daughter of George Jenkins, subject to his life estate as tenant by the curtesy, she being then an infant years old. That she continued to reside with her father until her marriage with James B. Pye, in by whom she had the complainants ; and in died leaving the complainants her heirs at law.

That she was never informed of the extent of the property to which she became entitled by the death of her mother, from whom the property descended to her, and had no means of acquiring information on the subject. That very soon after she attained the age of twenty-one, while she still remained under her father's roof, and remaining ignorant of the extent and value of her rights, the said George Jenkins, availing himself of his parental authority, and of the habit of implicit obedience and submission on the part of his child, procured from her a conveyance of all her interest in the estate of the said Richard Arell, her grandfather, dated the 15th of March, 1813, a copy of which is exhibited. It recites that whereas Richard Arell, late of the town of Alexandria, hath departed this life intestate, leaving a considerable real estate, consisting of lots, lands, and ground-rents, in and about the town of Alexandria, and in the State of Virginia ; and whereas the said Eleanor A. Jenkins, in right of her mother Mary Jenkins, now deceased, became entitled to a share or dividend of the real estate of the said Richard Arell, deceased, subject however to the life estate of the said George Jenkins, her father, and the said Eleanor Jenkins is desirous of conveying her reversionary interest in the said real property to the said George Jenkins, her father :

Now this indenture witnesseth that the said Eleanor A. Jenkins, for and in consideration of the sum of one dollar, to her in hand paid, the receipt whereof, &c., doth grant, bargain, and sell, aliene, release, and confirm to the said George Jenkins and his heirs, all the real estate and ground-rents of every description whatsoever, which the said E. A. Jenkins became entitled to, in right of her mother, Mary Jenkins, deceased, out of the estate of the said Richard Arell, deceased, and the reversion and reversions, remainder, rents, issues, and profits, and all her right, title, and interest in and to the estate of the said Richard Arell, deceased, whether divided or undivided ; to have and to hold the same to him and his heirs forever.

The bill further states that the consideration mentioned in the deed was merely nominal, and that it was never pretended that she ever received any valuable consideration for executing the deed. That it transferred all the property and estate of every description to which she had any right, and left her wholly destitute of support, and entirely dependent on her father, who was a man of large fortune. That the deed, under those circumstances, must be deemed to have been made in trust for the said Eleanor and her heirs. That the deed, having been made wholly without consideration, operates only as a resulting trust in favor of the said Eleanor and her heirs.

That if it was not intended as a trust it was obtained by undue influence of the father, and is therefore void in equity. That he sold and conveyed part of the property, and died in 1831, having left no valid will of his real estate. That he left two children by another wife, to wit, the defendants, John J. Jenkins, and Mary, now the wife of Robert Morrow, who, with the complainants, are his heirs at law. That John obtained administration of the estate of his father; and, with his sister, claims an interest in the real estate conveyed by the said Eleanor to her father, and that John has received the rents and profits. The complainants say that they are not disposed to disturb the title of purchasers, if they can receive the purchase-money, or an adequate compensation.

The answer of John J. Jenkins, admits that George Jenkins married Richard Arell's daughter Mary who died June 8th, 1796, intestate during the life of her husband, and leaving an infant daughter, Eleanor, born September 17th, 1790, and who married James B. Pye, in 1815, and died July 19th, 1818, leaving two infant children, the complainants. That Mary's right in her father's estate descended to Eleanor, subject to the tenancy for life of her father by the curtesy.

It insists on the validity of the deed from Eleanor to her father, and avers that it was made "freely and voluntarily, and without the smallest constraint or undue influence whatever; and with a full knowledge of the nature and extent of her rights;" and with the fixed and avowed purpose of enabling her father so to dispose of and manage the said property as should, in his judgment, turn it to the best account; and best enable him to do equal justice to all his family.

It denies that she was brought up in seclusion, as suggested by the bill; and avers that she was educated in the best schools, and had every means of information as to her rights that could be expected or desired. That George Jenkins died on the 8th of April, 1831, leaving a will and making this defendant sole executor. But the will was not so executed as to transfer real estate;

but it directs his Alexandria debts to be paid out of the rents of the Alexandria estate; and they have been so applied. That no account has been kept of the repairs; and that Pye, and his children, the complainants, have received from George in his lifetime several thousand dollars, in bank-stock and otherwise.

It relies upon the length of time since the date of the deed (15th March, 1813,) to the commencement of this suit, April 7th, 1832; about nineteen years.

It was agreed, by the counsel in the cause, that the answer of John J. Jenkins should stand for that of Morrow and wife; and it was admitted that at the date of the deed George Jenkins was a man of large fortune, and so continued until his death; and that the deed conveyed all the estate to which Eleanor was in any manner entitled.

Mr. Taylor, for the plaintiffs, cited *Moss v. Royall*, 12 Ves. 370; *Wright v. Proud*, 13 Ves. 137; *Newman v. Payne*, 2 Ves. Jun. 199; *Watt v. Grove*, 2 Sch. & L. 492; *Whichcote v. Lawrence*, 3 Ves. 741; *Hatch v. Hatch*, 9 Ves. 292; *Purcell v. McNamara*, 14 Ves. 91; *Revett v. Harvey*, 1 Simons & Stuart, 502; 1 Tamlyn, 421; *Hylton v. Hylton*, 2 Vez. Sen. 547; *Waller v. Armistead*, 2 Leigh, 11; *Kerby v. Taylor*, 6 Johns. Ch. Ca. 242.

Mr. W. L. Brent, *contra*, cited 4 Kent, 305; *Lloyd v. Spilling*, 2 Atk. 150; 4 Kent's Com. 462, 465; 2 Cruise, Deed, c. 27, § 45; *Jackson v. Garnsey*, 16 Johns. 189; *Underwood v. Hithcox*, 1 Vez. Sen. 279; 2 Har. & Gill, 102; *Child v. Coleman*, 2 Marshall, 299; *Buckler v. Haskell*, 4 Desaussure, 688; *Hatch v. Hatch*, 9 Ves. 297; 2 Eq. Ca. Ab. 282; *Cory v. Cory*, 1 Vez. Sen. 19; *Wickerley v. Wickerley*, 2 Eden, Rep. 77; 1 Eden, Rep. 340, 341.

THRUSTON, J., and MORSELL, J., being absent the case was submitted, upon the argument of counsel and the authorities cited, to CRANCH, C. J., to be considered in the vacation, who, on the 9th of July, 1835, filed the following opinion.

The answers having denied all restraint and undue influence, and having averred that the deed was made with a full knowledge of the nature and extent of the rights of the grantor; and these averments, being responsive to the allegations of the bill, are evidence for the defendants; and as there is no contradictory evidence, it is conclusive on that point.

The case of the complainants, therefore, rests wholly upon the invalidity of the deed by reason of the relative situation and circumstances of the parties at the time of the transaction.

It is the simple case of a deed of gift from a young daughter to a wealthy father, conveying all her property and leaving herself entirely destitute. Her estate was a reversion expectant upon the

death of her father, who was tenant by the curtesy. She was, therefore, not only in a situation to be operated upon by parental influence, but in that of an expectant heir dealing for a reversion and parting with it for an inadequate consideration.

There are many cases decided upon the principle that the party contracting was not perfectly free to act, and the other party has availed himself of his power or influence; and in such cases it has not been deemed necessary that there should have been actual fraud or imposition; but, from the relative situation of the parties, a court of equity will suppose that the party was not free to act, and will set aside the contract, as not having been made with his full and free assent. Among the relations, which a court of equity looks upon with a suspicious eye, are those of guardian and ward; parent and child; trustee and *cestui que trust*; tutor and pupil; attorney and client; master and servant; and the cases of expectant heirs and reversioners. In all these cases, the court requires the party seeking to avail himself of the contract, to show that it was fairly made, for full and valuable consideration, and with full knowledge, by the party sought to be bound by it, of all the circumstances, and of all his rights; and in some of these cases, the mere relation of the parties is sufficient to vacate the contract.

In *Morse v. Royal*, 12 Ves. 371, the Lord Chancellor said, "The authorities connected with this case are not many, and the principles are perfectly clear. One class of cases is that of contracts that may be avoided, as being contrary to the policy of the law, which are interdicted for the wisest reasons. Of that kind are a deed of gift obtained by an attorney while engaged in the business of the author of that gift; a deed by an heir, when of age, to his guardian; purchases of reversions from young heirs when of age." "To that class of cases I shall add the case of a trustee selling to himself. Without any consideration of fraud, or looking beyond the relation of the parties, that contract is void." "In all these instances there is no necessity for evidence; the contract is interdicted by the policy of the law." "I have no difficulty in saying I should not have regretted to have found that the rule extended even to such a case as this. Finding that there is so much difficulty in supporting a purchase by a trustee from the *cestui que trust*, that the transaction ought to be guarded with that necessary degree of jealousy running so near the verge, it might better be embraced under the policy of the law."

In *Wright v. Proud*, 13 Ves. 137, the principle of "the rule of guardian and ward," say the plaintiff's counsel "has been carried so far that a conveyance to a brother by an orphan living with him as one of his family, though no particular fraud appeared,

was set aside upon the ground of the relation enabling him to exert an undue influence;" and they cited the case of *Griffin v. DeVenville*, 3 Wood, App. 16; S. C. 1 Gwillim's Bac. Ab. 109; 3 P. Williams, 131, Mr. Cox's note.

In *Osmond v. Fitzroy*, 3 P. Williams, 131, the court said, "young heirs, even when of age, are under the care of a court of equity." In that case a voluntary bond by an heir twenty-seven years old, was set aside.

In the case of the *Duke of Hamilton et ux. v. Lord Mohun*, 1 P. Williams, 118, the Lord Chancellor said, that "this was within the common case of equity's relieving an heir against any private agreement with his father, upon the marriage of the heir; as where the father covenants to settle an estate on the marriage, and the heir privately agrees to pay back so much out of it to the father; the heir is under the awe of his parent in such case and not supposed to act freely; for which reason courts of equity relieve against such private agreements."

In *Hatch v. Hatch*, 9 Ves. 292, 297, the Lord Chancellor said, "If the court does not watch these transactions with a jealousy almost invincible, in a great majority of cases it will lend its assistance to fraud."

In *Cray v. Mansfield*, 1 Vez. 381, the Master of the Rolls says, "But there is another proper head of equity for the consideration of this court which will always hold a very strict hand over all deeds, purchases, and conveyances, obtained from young gentlemen soon after coming of age, by persons presuming too much on the confidence reposed in them, and drawing them in to execute the deeds."

In *Hylton v. Hylton*, 2 Vez. 548, the Lord Chancellor said, "Where a man acts as guardian, or trustee in the nature of guardian, for an infant, the court is extremely watchful to prevent that person's taking any advantage immediately upon his ward or *cestui que trust* coming of age, and at the time of settling accounts, or delivering up the trust, because an undue advantage may be taken. It would give an opportunity, either by flattery or force, by good usage unfairly meant, or by bad usage imposed, to take such advantage; and therefore the principle of the court is of the same nature with relief in this court on the head of public utility, as in bonds obtained from young heirs, and rewards given to an attorney pending a cause; and marriage brokerage bonds. All depends on public utility; and therefore the court will not suffer it, though perhaps in a particular instance there may not be actual unfairness. Upon that ground I went in the case cited; in which I have added at the end of my note taken at the hearing of the cause 'to be absolutely set aside; being

between a guardian and his ward just come of age, and on reason of public utility.'"

In *Waller v. Armistead's Administrator*, 2 Leigh, 14, the deed was by a ward of full age to his guardian.

The Court of Appeals in Virginia, said, "So many undue advantages may be taken in such cases, by means of the influence which may in various ways be exercised by the guardian, that the law, on a principle of public policy, vacates all such conveyances without proof of any actual fraud whatever."

In *Kerby v. Taylor*, 6 Johns. Ch. Rep. 249, the ward had given a release to her guardian, six months after she came of age. Chancellor Kent says, "It," (the release,) "is not necessarily to have been presumed to have been obtained by undue influence, like bonds from young heirs, or gifts and conveyances, and lucrative bargains from wards."

In *Revett v. Harvey*, 1 Simons & Stuart, 502, the solicitor acted as guardian. The ward gave a release two months after he came of age. The Vice-Chancellor set it aside, saying, "this case must be governed by the principles which apply to a guardian and his ward."

In *Butler v. Haskell*, 4 Desaussure, 702, the court says, "There seem to be two classes of decided cases on this subject; one where the relation of the parties is such that no contract can be permitted on any terms if sought to be relieved against; as the case of attorneys dealing with clients; or trustees selling to themselves; the other where the relation of the parties does not interdict all contracts on the subject of the trust; but where a confidence being reposed, the court looks with a jealous eye at the conduct of the agent, and will set aside the contract if there be any considerable inadequacy of price in the transaction; and more especially if there be any weakness or necessity in the vendor."

In *Carpenter v. Heriot*, 1 Eden's Rep. 342, the Lord Keeper said, "It appears to me that the bond was obtained by paternal influence; I am, therefore, of opinion, that it ought to be cancelled."

In *Huguenin v. Basely*, 14 Ves. 273, a deed by a widow to a clergyman and his family, obtained by religious influence and confidence, was set aside. See also *Norton v. Relly*, 2 Eden, Rep. 286, where an annuity was set aside, because obtained by spiritual ascendancy and religious delusion.

In *Grubbins v. Creed*, 2 Sch. & Lefr. 217, the Lord Chancellor said, "In the simple case of a mortgagor giving a lease to the mortgagee, there would not perhaps, be ground sufficient to impeach the lease; but if there be any thing more, the court will

look into the transaction with the greatest possible jealousy ; and if it prove to be a contract for a lease in consideration of forbearance, it is a contract for more than the law allows for forbearance, and is then usurious. I do not think that this case comes precisely within that description ; but it is manifest that Creed took advantage of his situation as mortgagee ; and if he did, the court cannot permit him to hold that advantage."

In *Evans v. Llewellyn*, 1 Cox, Ch. Ca. 333, 339 ; S. C. 2 Bro. C. C. 150, the deed was set aside as improvidently obtained, for an inadequate consideration, from persons in low circumstances, and unapprised of their right until the time of the transaction, though no misrepresentation or actual fraud, whatever, appeared to have been used.

The Master of Rolls, Sir Lloyd Kenyon, (March 5th, 1787,) in p. 339, &c., said, " The cases of infants dealing with guardians, and of sons with fathers, all proceed upon the same general principle, and establish this ; that if the party is in a situation in which he is not a free agent, and is not equal to protecting himself, this court will protect him. I do not know that the court has drawn any line in this case, or said, thus far we will go but no farther ; it is sufficient for me to see that the party had not the protection which he ought to have had, and therefore the court will harrow up the agreement. I am of opinion, in this case, the party was not competent to protect himself, and therefore this court is bound to afford him such protection ; and therefore these deeds ought to be set aside as being improvidently obtained."

In *Jeremy's Eq. Jurisdiction*, p. 399, it is said, " There are many cases in which this court will interfere to prevent improvident persons, or those claiming under them, from the consequences of their acts, where there is no express fraud, nor any peculiar relation between the parties ; nor that injury to the interests of third persons, which would, separately, invalidate the transaction ; but in which there exists such a combination of circumstances, partaking, in a slight degree, of some or all of the grounds of suspicion hitherto noticed, as to induce this court to exert a control ; and in respect to which it is held advisable not to give too particular reasons for its determinations.

In *Gwynne v. Heaton*, 1 Bro. C. C. 9, the Lord Chancellor (Thurlow) said, " The heir of a family, dealing for an expectancy in that family, shall be distinguished from ordinary cases ; and an unconscionable bargain, made with him, shall not only be looked upon as oppressive in the particular instance, and therefore avoided, but as pernicious in principle, and therefore repressed. This must be taken to be the established principle." " In those cases, fraud is not the ground of relief ; it is the example and

pernicious consequences. It is contended that this case is not within the view. I think no man's case can be more so than an heir expectant of an estate tail, and the father in possession of another estate, so that he stood fully in the situation which has served as an example of unequal dealing, in former times."

In *Young v. Peachy*, 2 Atk. 258, a conveyance, by a daughter to her father, obtained for one purpose, was attempted to be used by the father for another purpose. This was set aside.

Lord Chancellor Hardwicke says, (in p. 258,) "In the present case the recovery was suffered for one purpose, and is attempted to be made use of for another; and though it has been objected, the allowing the evidence of this sort is against the statute of frauds and perjuries, yet, if that objection should be allowed, the statute would tend to promote frauds, rather than prevent them; for these reasons, therefore, I declare, though there had been no other circumstances in the case, I should have been of opinion that the recovery ought to be set aside; but the case is greatly strengthened when it comes to be considered that this was a recovery obtained by a father from his child; and when that is the case, it affords another strong circumstance in order to relieve the plaintiffs."

"In the case of *Glisson v. Ogden*, before Lord Chancellor King, that circumstance was strongly relied upon; but his lordship refused to give relief; for he said it was a fair bargain between a father and his child, and he would not weigh in golden scales, whether the consideration was exactly even or not. In March, 1731, there was an appeal to the House of Lords from that decree: upon the appeal the lords laid great weight upon that circumstance, that the conveyance was obtained by the father from his daughter in distress, and the decree of Lord Chancellor King was reversed."

From these authorities, it seems to be perfectly clear, that the deed from Eleanor Jenkins to her father, George Jenkins, ought to be set aside, both on the ground of the relation of the parties, and the conveyance being of a reversion to the party who had the life estate, for an inadequate, or rather for no valuable consideration.

The interlocutory decree, suggested by the plaintiff's counsel, may be drawn up.

The March term was then adjourned to the 27th of May; the Alexandria May term being held in the intermediate time.

A final decree, in favor of the complainants, was rendered in 1837, which was reversed, upon appeal to the Supreme Court, in 1838. 12 Peters, 241.

CIRCUIT COURT OF THE UNITED STATES.

MARCH TERM, 1835, AT WASHINGTON, CONTINUED.

UNITED STATES *v.* JOHN B. GORMAN.

Debtors of the United States are not entitled to the benefit of the prison bounds in the District of Columbia.

DEBT on a prison-bounds bond given to the United States in the penalty of \$450, dated the 14th of June, 1830, and executed by Jacob Dixon, and the defendant, and another surety, with the following condition:

Whereas the above bound Jacob Dixon is confined in the prison of Washington county, and in the custody of the marshal of the District of Columbia, by virtue of a writ of *capias ad satisfaciendum*, issued out of the Circuit Court of the District of Columbia, for the county aforesaid, on a judgment rendered by the said court, for the sum of \$200 fine, and \$23.01 costs, at the suit of the United States aforesaid; and having prayed for liberty to walk out of prison and within the bounds thereof as fixed by law, which is granted to the said Jacob Dixon, he complying with the provisions of the statute in that case made and provided.

Now, therefore, if the above bound Jacob Dixon shall continually keep, remain, and stay within the prison bounds aforesaid, that is, for the said county of Washington, as now marked or laid out, or as hereafter may be, from time to time, marked and laid out by order of the Circuit Court of the District of Columbia, in and for said county of Washington, and not depart therefrom until he the said Jacob Dixon shall, by due course of law, be finally discharged from the said prison and bounds, then the above obligation shall be void; otherwise to remain in full force and virtue in law.

The declaration, after setting forth the bond and its condition, averred, as a breach thereof, that the said Jacob Dixon did not continually keep, &c., but departed therefrom, without being dis-

charged in due course of law, whereby action hath accrued to the said United States, to demand and have of the said John B. Gorman, the said sum of \$450, &c.

To this declaration the defendant demurred generally.

Mr. Dandridge, for the defendant, contended that every bond, given for ease and favor of a person in execution, is void, unless expressly authorized by law; and cited 1 Saund. 35, note; *Thompson v. Bristow*, Barnes's notes, 205; *Vigers v. Aldrich*, 4 Burr. 2482; *Da Costa v. Davis*, 1 B. & P. 242; *Blackford v. Stewart*, 2 East, 243; and *Van Renselaer v. Schemmerhorn*, 5 Johns. 363.

By the 16th section of the Insolvent Act of March 3, 1803, [2 Stat. at Large, 237,] (all the preceding sections having been occupied by provisions respecting insolvent debtors,) it is enacted, "That the said court may cause to be marked and laid out reasonable bounds of the prisons in the said district, to be recorded in the same court; and from time to time may renew, enlarge, or diminish the same; and every prisoner not committed for treason or felony, giving such security to keep within the said bounds as any judge of the said court shall approve, shall have liberty to walk therein, out of the prison, for the preservation of his health; and keeping continually within the said bounds, shall be adjudged in law a true prisoner."

And by the seventeenth section it is enacted, "That the provisions of this act shall not be construed to extend to any debtor who is or shall be imprisoned at the suit of the United States."

The defendant was a debtor who was imprisoned at the suit of the United States, and, therefore, was not entitled to any of the benefits of the act.

Mr. Key, contra, for the United States, contended that this bond is good as a voluntary bond, of which the defendant has had the benefit. *United States v. Howell*, 4 Wash. C. C. R. 620.

But it is good, also, as a statutory bond, under the sixteenth section of the insolvent act. The seventeenth section refers only to the provisions respecting the surrender of the effects of insolvent debtors and the discharge of their persons from arrest and imprisonment on account of any debt contracted before their application for relief. And the reason why those provisions should not extend to debtors of the United States was, that Congress, by the Act of June 6, 1798, [1 Stat. at Large, 561,] had made special provisions on the same subject; and it cannot be supposed that Congress meant, by the seventeenth section of the insolvent act, to deprive the debtors of the United States in this district of the benefit of the prison bounds, which they had expressly granted to all other debtors of the United States in civil actions by the Act of January 6, 1800, [2 Stat. at Large, 4,] and which, by the six-

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teenth section of the insolvent act, they had expressly given to all prisoners, except those committed for treason or felony. The words of the seventeenth section may be satisfied by applying them to the provisions of the act respecting the surrender of the property and the discharge of the person of debtors upon such surrender. And by that construction the incongruity will be avoided which would grant the privilege to all debtors of the United States excepting those residing in this district. And this is the construction which has been given to the insolvent act, in this respect, from the time of its enactment to the present moment. The consequence of a different construction would be, that prisoners committed for any crime, except treason and felony, would be entitled to the bounds, while simple debtors of the United States, instead of being committed for safe keeping only, would be committed to the same close custody with condemned traitors and felons. The Court had power to limit the bounds to the high brick walls surrounding the gaol. They have extended it further, but that cannot alter the construction of the act.

At November term, 1833. The COURT (CRANCH, C. J., *contrà*,) ordered judgment to be entered for the defendant, upon the demurrer in this cause, and in twenty-four other suits on like prison-bonds bonds, given by persons who had been arrested on *ca. sas.* for fines for keeping public gaming-tables.

 UNITED STATES v. GEORGE MILBURN.

When a special session of the Court is ordered for the trial of criminal causes the criminal causes pending in the preceding regular term cannot be continued to the special session, nor can any order be made therein at such special session.

Quere? whether a new *capias ad respondendum*, for a misdemeanor, can be issued, while the party is in custody of his bail upon a former *capias* for the same offence, he having failed to appear according to the tenor of the recognizance of bail?

At a special session of the Circuit Court of the District of Columbia, for the trial of criminal causes, held on the first Monday of September, 1833, by an order of the Court made at the preceding regular March term,

Mr. Key, District Attorney, moved the Court to order a new *capias ad respondendum* against the defendant, George Milburn, upon the presentment found at November term, 1832, for keeping a certain gaming-table called a faro-bank, upon which a *capias ad respondendum*, returnable immediately at that term, was returned *non est*. A new *capias* was issued, returnable to March term, and was returned, "*cepi recognizance*." The recognizance was for-

feited, and writs of *scire facias* were issued against Milburn and his sureties returnable to the next regular term of the Court, namely, November term, 1833, (being the then next November term,) a new *capias* was issued upon the same indictment, returnable to this special session, upon which Milburn was taken and discharged on *habeas corpus* by CRANCH, C. J., because he had been arrested before, and given bail upon the same indictment. See *Watkins's case*, at the last term, and the opinion of the Court.

The COURT ordered the question upon *Mr. Key's* motion to be argued on the 23d instant, (that is, 23d September, 1833); CRANCH, C. J., *contrà*; being of opinion that the Court, at this special session, has no jurisdiction of the prosecution against Milburn pending at a preceding regular term.

Mr. Key. By the Act of March 2, 1793, [1 Stat. at Large, 333,] a special session is, in effect, only an adjournment of the criminal business. It is still a Circuit Court, having all the criminal jurisdiction of a regular stated session. All process, &c. is to be returned to the special session. It is not process until an indictment or a presentment is found.

(CRANCH, C. J. That act does not apply to this Court, it applies only to courts called by the Supreme Court, or by a judge of the Supreme Court and the district judge.)

Mr. Key. The act was to apply to cases pending in the Circuit Court by presentment or indictment, otherwise it might be holden and no offences to try.

The opinion of Judge Wilson, 3 Dall. 18, is entirely founded on its being a special session overleaping the stated session of the Circuit Court.

It was certainly competent for this Court, at the last stated session, to order all its unfinished criminal business to be continued to this special session.

If the causes at the last term were ordered to be continued to this special session, and this Court has not jurisdiction of them at this session, they are all discontinued.

This Court, formerly, (in 1821,) held a special session and tried indictments found at a preceding stated session. This Court will not oust itself of its jurisdiction by a mere doubt.

Mr. Jones, contrà. The Act of 1789, § 5, [1 Stat. at Large, 73,] giving the power to hold special sessions only applies to the time of holding them; the Act of March 2d, 1793, § 3, to the place. Both should have the same construction. The process mentioned in the latter act, is the process only which is applicable to the cases to be tried at the special session.

In *Hamilton's case*, 3 Dall. 17, the Supreme Court say, "There is a provision, 'that all business depending for trial at any special

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court, shall at the close thereof, be considered as of course removed to the next stated term of the Circuit Court,' but there is no power given to remit to a special court, the business depending for trial before the stated Circuit Court."

And in the case of "*The Insurgents*," 3 Dall. 513, the opinion expressed in *Hamilton's case*, upon this point, is confirmed. These opinions are decisive on that point.

The COURT (MORSELL, J., *contrà*,) was of opinion that we cannot, at this special session, try an indictment found at a stated court; and

The COURT also, (THRUSTON, J., *contrà*,) decided that it had not jurisdiction to issue the process in this case; the Court having previously decided that it had no jurisdiction to try the cause.

The following is the opinion of CRANCH, C. J., upon his discharge of Milburn upon the *habeas corpus*, referred to by counsel, in argument, before the Supreme Court, in *Ex parte Milburn*, 9 Peters, 708.

At November term, 1832, George Milburn was indicted for keeping a faro-bank, against the form of the statute, &c. Upon this indictment a *capias ad respondendum* was issued, during the term, returnable immediately, and was returned *non est inventus*. On the 29th of January, 1833, in vacation, a second writ of *capias ad respondendum* was issued, which did not, in any manner, refer to the former writ. This second writ was returnable to the fourth Monday in March, (the first day of March term,) and was returned, "*cepi recognizance*," meaning, thereby, that the defendant had been taken, and had given bail. The recognizance was taken in conformity with the provisions of the Act of Maryland, October, 1780, c. 10, in the sum of \$266 $\frac{2}{3}$ (£100 Maryland currency.) By the second section of that act, the sheriff, upon any criminal writ for any offence less than felony, is required to take a bail-bond of the criminal and his surety, if judged necessary, in a sum not exceeding £100, conditioned that the criminal shall appear in court on the day of the return of the writ, attend the court from day to day, and not depart therefrom without leave of the court and in case the criminal shall not be considered by the sheriff sufficient for that sum, and cannot find approved security, the sheriff is to take him before a magistrate, to be dealt with agreeably to the law then in force. The general practice of the sheriff, and of the marshal of this District, under this act, has been to take the party before a justice of the peace, who takes the recognizance in the sum of £100, considering the statute as a guide to his discretion.

Although the keeping of a faro-bank is, by the Act of the 2d of March, 1831, made punishable by imprisonment and labor in the

penitentiary, yet the nature of the offence is not thereby changed ; it is still an offence less than felony ; and is, therefore, within the provisions of the Act of Maryland, of October, 1780, c. 10. At the March term, 1833, to which the writ was returnable, the defendant was called, and, failing to appear, the recognizance was forfeited, and writs of *scire facias* issued thereupon against him and his sureties, returnable at November term, 1833 ; and a new *capias ad respondendum*, upon the same indictment, issued against the defendant during the term, returnable immediately, which was returned *non est inventus*. This writ did not, in any manner, refer to either of the former writs of *capias*. On the 1st of June, 1833, in vacation, a fourth writ of *capias ad respondendum* against the defendant was issued by order of the district attorney, upon the same indictment, returnable to the next November term. This writ, also, did not refer to any former writ. Upon this writ the defendant was taken, and being brought before me by *habeas corpus* in the vacation preceding the November term, was discharged, upon the ground that he was not lawfully taken by the last writ, as he had already been taken upon a former *capias* issued upon the same indictment, and had given what by the Act of Assembly was deemed sufficient bail ; in whose custody he still remained. The marshal having returned this matter specially, a motion is now made by the attorney of the United States for this District, for a fifth writ of *capias ad respondendum* upon the same indictment ; and the question is, whether such a writ can now issue in this case agreeably to the principles and usages of law. When the case was before me upon *habeas corpus*, I thought it could not ; and will now state the reasons why I thought so.

In the first place. No such writ had ever been before issued in such a case in this court during the thirty-three years of its existence. I say this with great confidence, because, having had a seat upon this bench during the whole of that period, and having been seldom absent from court, if it had occurred, it could scarcely have escaped my notice ; and lest my memory should have failed me, I have recently examined with great care all the docket-entries and minutes of every session of the court in relation to criminal causes from the year 1800 to the present time, with a view to this question.

In every session I found entries of recognizances forfeited ; but not a single case in which a new *capias ad respondendum* had been issued against the party who had been taken upon a former writ upon the same presentment or indictment, and had given bail ; nor a single case in which a new *capias* has been issued upon the same indictment or presentment after the forfeiture of the recognizance given upon a former *capias*.

The fact that no such subsequent *capias* had ever been issued, or even asked for, where cases were occurring at every session in which it would have been proper to issue it, if it could be lawfully issued, was to my mind, almost irresistible evidence that it could not be lawfully issued.

In the second place. In all the books of entries and precedents of proceedings in criminal cases, which I have had it in my power to consult, (and I have looked into many,) I do not find the form of an entry of any order for a new *capias ad respondendum*, in a case of misdemeanor, after arrest and bail upon a former *capias*.

It has been suggested, in answer to this objection, that every defendant who forfeited his recognizance, fled the country; and, therefore, it would have been in vain to issue a new *capias*. But that fact cannot be admitted. It is hardly possible that every person charged with misdemeanor and forfeiting his recognizance, both in England and in the United States, should have fled the country; and that the prosecutors should have been so certain of the fact, and so sure that the defendant would never return, as not to cause a second *capias* to be issued in the hope of taking the offender, and bringing him to trial.

3. I have not found in the books a single instance of a second recognizance for the same offence, forfeited, and estreated into the exchequer.

4. I have not found a single case, in the English or the American reports, in which a second *capias ad respondendum*, in a case of misdemeanor, was issued after bail had been given upon a former *capias* issued upon the same indictment. Nor have I found a case in which such a practice has been sanctioned or even alluded to by the court.

5. I have not found such a doctrine in any of the English or American elementary treatises upon criminal law, where, if such were the law or the practice, it would undoubtedly have been stated.

In arguing the case of Mary Wertz, at the special session in September last, upon the motion for a new *capias*, after forfeiture of her recognizance, the counsel for the United States cited several authorities, which deserve consideration.

The first was 1 Chitty's Cr. Law, 59, 61. "But if a constable, having arrested a party under a warrant, suffer him to go at large, upon his promise to come again, and find sureties, it is doubted whether he can afterwards be arrested upon the same process; though it should seem that, as the public are interested in the offender's being brought to justice, there is no well-founded objection to such second arrest. And it is certain that if the escape be

without the concurrence of the officer, the offender may be retaken as often as he flies, upon fresh suit, although he were out of view, or had reached another country or district." "But where the officer has voluntarily suffered the prisoner to escape, it is said, by some, that he can no more justify the retaking him than if he had never had him in custody before; because, by his own consent, he has admitted that he has nothing more to do with him. It should seem, however, that the misconduct of the officer ought not to prevent a second arrest, in order that the offender may be brought to justice."

It will be perceived, at once, that this authority refers only to the power of the officer to make a second arrest upon the same warrant, in case of escape, and is no authority for issuing a second *capias ad respondendum*, after arrest and bail upon the first.

The next authority cited was from the same volume, p. 100, where it is said, "In criminal cases, no justification being requisite, bail is absolute in the first instance. The magistrate may, however, examine them upon oath as to the sufficiency of their estate; and it is said that if he be deceived, he may require fresh sureties." This, however is not the present case. It is not alleged that the estate of these sureties is insufficient. Chitty refers to 2 Hawk. P. C. c. 154, where the reason is given thus: "For that insufficient sureties are no sureties." The second arrest, therefore, could, in that case, be justified only because no bail had been given. It does not appear in Chitty or Hawkins, or in Hale's Summary, 96, or in Dalton, c. 70, and 114, cited by Hawkins, whether a second arrest on the same process is intended, or an arrest upon new process. The former is most probable. For the language of Hawkins is, "and if a person who has power to take bail, be so far imposed upon as to suffer a prisoner to be bailed by insufficient persons, it is said that he, or any other person who hath power to bail him, may require the party to find better sureties, and to enter into a new recognizance with them, and may commit him on his refusal; for that insufficient sureties are no sureties." This language seems to imply that the party is already arrested and before the magistrate, which may be by a new arrest on the same warrant, as in cases of escape. And in the case of *Rex v. Salter*, 2 Chitty's Rep. 109, it was decided, that "after a defendant has been admitted to bail on a criminal charge, the court will not increase the bail on an affidavit disclosing facts in aggravation of the original offence, and rendering the enormity of it greater than had appeared to the court, when they granted the rule for the allowance of bail."

In that case, Mr. Justice Bailey said, that "he doubted how the defendants, having been once arrested, could be arrested again,

which, in fact, must be done to compel them to give additional bail."

The case put by Chitty and Hawkins is one in which, in effect, no bail was given. In the present case, sufficient bail has been given, and the party is still in their custody.

The next authority cited is 1 Chitty, 102. "The admitting bail, where it ought not to be taken," "is liable to be visited as a negligent escape at common law;" that is, as I understand it, the sheriff or magistrate who takes the bail is liable to be punished as for a negligent escape. But it does not follow that the sheriff or magistrate has a right to a new writ to arrest the party. The utmost that the law would allow would be, that the party should be taken again by the same writ, as in other cases of escape.

But that is not like the present case, in which the bail was properly taken, and is in full force.

The next authority cited is 1 Chitty, 338. "Whenever the king grants an authority of oyer and terminer, the power to issue process is incidentally given; for, as there can be no inquiry respecting offences without the presence of the party, wherever the power is intrusted of determining the former, there must also be authority to compel the latter." "If the defendant, not being in actual custody, voluntarily appear in court, it is discretionary, and not obligatory, in the court, to detain him; but they may leave him to be taken by the ordinary legal process.

The correctness of these principles cannot be questioned; but it does not follow that the defendant may be arrested upon a second *capias ad respondendum*, after having given sufficient bail upon the first writ issued upon the same indictment for the same misdemeanor.

The next authority cited is 1 Chitty, 342. "The practice in issuing the bench-warrants is, that where the parties are not under recognizance, the prosecutor has a right, during the assizes or sessions, to this process against them, to bring them immediately into court to answer. But when the parties are under recognizance, no process can be had against them during the assizes or sessions, because it is looked upon in law as but one day, and the defendant has the whole to make his appearance. In such case, however, the prosecutor may, if the defendant has not appeared, bespeak a bench-warrant during the assizes or sessions, which will be issued at the close thereof. If the assizes or sessions are over, and no bench-warrant has been previously applied for, then a warrant from a single judge, or justice of the peace, may be obtained; and in order to make the application effectual, it must be grounded upon the certificate of the clerk of assize, or the

clerk of the peace, that the indictment has been found against the defendant, upon which the warrant will be granted."

It is evident that the recognizance here spoken of is the recognizance taken by a magistrate out of court, before presentment or indictment, in which case the defendant is charged only upon suspicion, the magistrate having no power to pronounce authoritatively upon the truth of the allegation. But a presentment or indictment affirms the fact positively and precisely. It may or may not be the same offence for which the defendant was bound over, or it may be of a more aggravated character; it is not connected by the record, with the previous recognizance; it therefore becomes a new cause of arrest, and has always been so considered by this court; and a *capias ad respondendum* issues, of course, returnable to the next term, unless specially ordered to be returnable immediately, which is often done in cases of an aggravated nature; but this does not show that a second *capias ad respondendum* can be properly issued against a defendant who has been arrested and given sufficient bail, on a previous *capias*, upon the same indictment in a case of misdemeanor.

The next authority cited is 1 Chitty, 695. "When any corporal punishment is to be inflicted on the defendant, it is absolutely necessary that he should be personally before the court at the time of pronouncing the sentence. But where a pecuniary penalty only can be awarded, judgment may be given in his absence, if a clerk in court will undertake for the fine, and the court think fit to dispense with his attendance. And one reason of this distinction is, that a *capias pro fine* may be issued to take him, in case he refuse to pay the sum imposed on him, though it is said that there can be no process after judgment to bring him in, in order to set him in the pillory, or to visit him with any corporal infliction;" "and, therefore, where the judgment may probably be of a corporal nature, or the offence is of a gross and public nature, the court, who may, in all cases, act, in this respect, according to their discretion, will insist on the appearance of the offender, even though a clerk assents to answer for the fine." Such, also, has been the doctrine and the practice of this court; and in cases of misdemeanor the court has often, in its discretion, refused to suffer the cause to be tried unless the defendant be personally present; and if the defendant, when called, did not appear, has proceeded to forfeit his recognizance. And where the defendants, in such cases, have been tried and convicted in their absence, the court has often ordered writs of *capias* to be issued *ad audiendum judicium*; but this does not show that the court can or ought to issue a second *capias ad respondendum* after sufficient bail given upon the first.

These are all the authorities, from the books, cited on the part of the prosecution in *Mary Wertz's case*; but there are others which seem more strongly to countenance the practice contended for by the Attorney of the United States than those which were cited; and I shall proceed to consider them.

It is said in *Highmore on Bail*, 200, "If the offenders appear not upon their recognizances the first day, the default is to be recorded, and the recognizances to be forfeited; nevertheless, processes, or warrants, as the case shall require, to go out against them and their bail; so likewise as to those who are bound to give evidence; that, if possible, the business be not deferred to another sessions; in which time, commonly, the prosecutors and witnesses are taken off, and the matter compounded." Kel. 2.

The above is a literal copy of one of the rules of practice "to be observed by the justices of the peace and others, at sessions in the Old Bailey, for London and Middlesex, in the 16th Car. 2, by" three judges of the King's bench, and two judges of the common pleas, "and signed by them, and read in open court, and ordered to be filed by the clerk, that all justices might take copies by them if they please; for that they shall not for the future pretend ignorance of their duty." The first rule is, "that all recognizances and bailments taken by any justice of the peace be certified into the court the first day of every session before noon," &c. The second, (as above cited by *Highmore*,) "If the offenders appear not upon their recognizances the first day," &c.

So that it is evident that the recognizances mentioned in the rule cited by *Highmore* are those which were taken by justices out of court, and before presentment or indictment; and that the processes which were to issue against the offenders and their bail, were to be like those against persons bound to give evidence; that is, process founded upon their recognizances. And no doubt *Highmore* alludes to the like recognizances taken before presentment or indictment, when, in page 202, he says: "If a principal do not appear, and the recognizance be forfeited and paid by the bail, yet the principal shall remain open and liable to the law, whenever he can be taken; for the penalty in the recognizance is no other than as a bond to compel the bail to a due observance thereof, and has no connection with the principal. They could not sue him thereon for money paid to his use, or on his account, for it was paid on their own account, and for their own neglect; but having paid it, they are wholly exonerated, though the offender remains liable for his offence."

Highmore cites no authority, and is none himself. He has certainly misunderstood the law in supposing that the bail cannot sue the principal for the money paid on the recognizance. See *Fisher v. Fallows*, 5 Esp. 171.

2 Hawkins, P. C. c. 27, § 29. "It seems that if a defendant appear to an indictment or appeal of felony, and afterwards, before issue joined, make an escape, whether from his bail, or from actual prison, the common *capias*, *alias*, and *pluries*, &c., shall be awarded against him, unless there had been an *exigent* before, in which case a new *exigent* shall be immediately awarded; and if a defendant, against whom no *exigent* had been before awarded, make such default, after issue joined, and an inquest awarded to try it, it seems that a *capias*, &c., shall be awarded against him *ad audiendum juratam*, &c.; and, as I take it, the same day on which the *capias* is returnable, shall be given to the inquest; for it seems agreed that the inquest shall never be taken by default in the case of felony, as it may for an inferior crime." Hawkins refers to Hale's Summary, 211; 2 Hale's II. P. C. 201, 202; 16 Assizes, Pl. 13; 26 Assizes, Pl. 51; Fitz. Exigent, 10; Staundforde's P. C. 70, letters E and F; 2 Hale's II. P. C. 224; Brooke's Ab. tit. Waiver de Choses, 39.

Hale, in his Summary, p. 211, speaking of appeal in felony, says: "If the defendant comes in by *capias*, and, after appearance, make default, a new *capias*; if upon *exigent*, a new *exigent*, and upon second appearance shall plead *de novo*, for the first inquest is *sine die*." He cites no authority.

Hawkins, in his note (e) to that part of the text which says, that if a felon escape from his bail before appearance, a new *capias* shall be awarded, says, but this is made a *quære*. Crompton, 150, (b.) I have not been able to find Crompton, (I suppose the book referred to is Fitzherbert's Justice, enlarged by Richard Crompton, 4to. 1617,) and therefore cannot say upon what ground the doubt of Crompton or Fitzherbert arose. I have, however, examined the authorities cited by Hawkins, and find that the cases referred to were not cases of bail, but of mainprise; which differ in this essential point, that bail is custody, but mainprise is not.

Thus Lord Hale says, in his Summary, 99, (5th edition): "Mainpernors are only surety; but bail is custody; and, therefore, the bail may seize the prisoner if they doubt he will fly, and detain him, and bring him before a justice; and the justice ought to commit the prisoner in discharge of the bail; or put him to find new sureties."

And Lord Coke, in his 4th Institute, folio 178, says, that the entry is *traditur in ballium*; that the word *ballium* is "from the French noun bail, that signifieth a guardian, keeper, or gaoler," and that, in the customs of Normandy, "bailment is called a living prison."

In the Year-Book of 33 H. 3; Fitz. Mainprise, 12, it is said, "By Sharde, there is a diversity between bail and mainprise;

for the entry of bail is, that such an one *traditur in ballium*, in which case they are his keepers; and if they suffer him to escape, they shall answer for it."

In H. 36, E. 3, Fitz. Mainprise, 13, it is said, "They would justify; but it seems they could not; for the entry is that such an one and such an one have mainprised (*manuceperunt*.) But where he is delivered to them in bail, they may well imprison him;" per Wilby, in Debt, &c.

In 4 Inst. 170, Lord Coke says: "In the next place we are to speak of mainprise, — *manucaptio*, — which deriveth itself and signifieth a taking into the hand. Every bail is mainprise, (for those that are bail take the person bailed into their hands and custody,) but every mainprise is not a bail; because no man is bailed but he that is arrested, or is in prison; for he that is not in custody or in prison cannot be delivered out; as before it appeareth; but a man may be mainperned that never was in prison; and therefore mainprise is more large than bail." And in the same page he says, "The entry is, *Et super hoc prædictus a dimittitur*" (is discharged) "*per manucap. E. D. and E. F. qui cum manuceperunt ad habendum corpus ejus hic ad præfatum terminum et sic de die in diem &c., quousque,*" &c. "And this is properly in the entry said by mainprise and no bail," &c. "Now, forasmuch as every bail is a mainprise, (as hath been said,) bail is oftentimes termed in our books by the name of mainprise, as before it hath partly appeared, and as it appeareth in the writ *de manucaptione*, and in divers acts of Parliament."

"Lastly, there is a manifest diversity between *de die in diem* and bail. For he that is by mainprise *de die in diem*, no bill can be maintainable against him; otherwise it is against him that is by bail; *per cursum curiæ*."

In 2 Hale's H. P. C. 124, Lord Hale says: "Bail and mainprise are used promiscuously oftentimes for the same thing," "but yet in a proper legal sense they differ." "He that is delivered *per manucaptionem* only, is out of custody; but he that is bailed is, in supposition of law, still in custody; and the parties that take him to bail are in law his keepers, and may reseize him to bring him in; and, therefore, if a man be let to mainprise, suppose in the King's bench, an appeal, or other suit, cannot be brought against him as *in custodiâ marescalli*; but if he be let to bail, he is, in supposition of law, still *in custodiâ marescalli*. 3 E. 3; Mainprise, 12; 36 E. 3; Id. 13; 32 H. 4, 6, (a); Protection, 13; 21 H. 7, 20, (b.) per Fineaux, and 9 E. 4, 2, (a)." "And in p. 125, he says, the entry on the record in the one case is *deliberatur per manucaptionem*, and in the other case *traditur in ballium*." In page 126, he gives the proper form of the recognizance of

bail, and in page 127, he says, "the advantage of this kind of bail is this, that it is not only a recognizance in a sum certain, but also a real bail, and they are his keepers, and may be punished by fine beyond the sum mentioned in the recognizance, if there be cause, and may reseize the prisoner, if they doubt his escape, and bring him before the justice, or the court, and he shall be committed, and so the bail be discharged of his recognizance. 36 E. 3, Mainprise, 13; 23 E., Mainprise, 23; Crompton, Justice, F. 157, (a.) So in his chapter touching justices of gaol-delivery, [2 H. H. P. C. c. 5, p. 35,] who have only a commission to deliver the gaol of the prisoners therein being, he says, "if a person be let to bail, yet he is, in law, in prison, and his bail are his keepers, and therefore the justices of gaol-delivery may take an indictment against him as well as if he were actually in gaol; but he that is let to mainprise is not in custody. 21 H. 7, 33, (a); 9 E. 4, 2, (a); 39 H. 6, 27, (b,) in one case the entry is *traditur in ballium*, in the other *deliberatur per manucaptionem*."

In p. 199, of the same book, he says, "Justices of gaol-delivery regularly cannot issue a *capias* or *exigent*, because their commission is to deliver the gaol *de prisonibus in eâ existentibus*, so that those whom they have to do with are always intended in custody already."

So in his chapter concerning certain treasons, [1 H. H. P. C. c. 25, p. 325,] in speaking of that clause of the statute of 13 E. c. 1, which exempts from the penalties of the act those who should give alms in money, meat, apparel, &c., to any offender, "during the time of his imprisonment," he says, "but, *nota*, it extends no further than during the time of his imprisonment; yet the law is all one if he be under bail, for he is in *custodiâ* still, for the bail are, in law, his keepers; and he that is delivered to bail in the King's Bench is, nevertheless, said to be in *custodiâ marescalli*." And in page 620, he says: "If a felon be in prison, he that relieves him with necessary meat, drink, or clothes, for the sustentation of life, is not accessory. So if he be bailed out till the next sessions, &c., it is lawful to relieve and maintain him; for he is *quodammodo* in custody, and is under a certainty of coming to his trial." Crompton, 42; 6 Dalt. p. 286, (or 530.) See also the following cases in the Year-Books, showing the distinction between bail and mainprise, and that the former is custody, and the latter is not. Pasch. 9 E. 4, 4; 21 H. 7, 33; 39 H. 6, 27, 6, pl. 39; 32 H. 6, f. 4, pl. 3; 9 E. 4, 2; 22 H. 6, 59, 60; 21 H. 7, 20. See also Dalt. Sheriff, 356, c. xevi., and *Gorge & Lane's case*, Godbolt, 339; and 1 Chitty, Crim. Law, 104. See also, *Gorsuch v. Holmes*, 4 Har. & McH. 4; *Osburn v. Jonse*, Id. 5, note (a).

S. Chase, Ch. J. "If, on suing the bail-bond, the prisoner is

out of custody of the sheriff, I conceive he can never again be in his custody, in virtue of the mesne process in that action; and the sheriff would be liable to false imprisonment if he were to take him against his consent, and I apprehend that against his consent he cannot be surrendered to the sheriff by his bail, but they may keep him, and surrender him in court. There is a difference between manucaptors, which are that the party shall appear at the day, and bail. 3 Vin. Bail, 493, pl. 11, cites Godb. 339."

These authorities seem clearly to establish the doctrine, that bail is custody, and that mainprise is not.

Hawkins refers to Hale, and Hale cites the same cases which Hawkins has noted in the margin of his 2d book, ch. 27, § 19, to show that if a felon escape from his bail, a *capias ad respondendum* or *ad audiendum juratam*, may be issued, according as he had pleaded or not before his default. If those cases are cases of mainprise, and not of bail, and if bail be custody, and mainprise be not, then the cases cited do not support the doctrine for which they were cited, and if they did, yet the doctrine itself is only applicable to a case of felony; but the present case is one of misdemeanor.

The only cases cited to support the doctrine, are 16 Assiz. 13; 26 Assiz. 51; and T. 19 E. 3; Fitz. Exigent 10, which seems to be the same case as 16 Assiz. 13.

The case in 16 Assiz. 13, is thus stated by Fitzherbert, tit. Corone, &c. 173.

"In appeal of rape, the defendant pleaded not guilty, and was let to mainprise to attend the inquest and judgment, and afterwards came not; whereupon *capias* was awarded against him, and *alias* and *pluries* now returned, and he came not. Scott awarded an *exigent*, and said, that if he rendered himself pending the *exigent*, he would try to make the inquest come again, for it is now without day by the *exigent* issued upon his first plea; and so it was done, and note that he would not take the inquest by default, for it is a case of felony."

The case in T. 19 E. 3, Fitz. Exigent, pl. 10, is thus stated by Fitzherbert.

"Appeal of rape. The defendant pleaded not guilty, and was let to mainprise to attend the inquest; and afterwards came not; whereupon, *capias* was awarded against him to hear the inquest, and also an *alias* and *pluries* now returned, and he came not.

"Scott: If we award more *capias*, this process is infinite; and we cannot take the inquest by default in this case, because the judgment is of life and member; and if the *exigent* issue, the inquest will be without day, and pending the *exigent* he may render himself, and plead *de novo*, which would be great delay. Th.

(Thorpe.) This suit is but trespass at common law, wherefore try (asseies) to take the inquest by his default. Scott: Here we can do nothing but award the *exigent*, and if he do not (qu?) render himself (*s'il ne rend*) pending the *exigent*, we will try to make the inquest come upon his plea pleaded," "*et ita factum est.*"

The case in 26 Assiz. 51, Fitz. Corone, &c. pl. 196, was this: "A woman brought appeal in the K. B. of the death of her husband. The defendant rendered himself pending the *exigent* against him, and pleaded not guilty, &c., at which day search was made by the coroners of the place, and he was not found; and by inquest it was found that he had escaped without the will of the marshal. Shard demanded of the justices of the common bench whether the inquest should be taken, &c., or whether a *capias*, &c., or an *exigent de novo* should be granted; and by the award of them all, the *exigent de novo* was awarded, whereby it was commanded that the sheriff should take him, if, &c., *ad audiendum judicium*; and if not, &c., that he should be demanded, &c. And note, that the same defendant was taken at the suit of the wife of another, &c., and, notwithstanding, by the advice of all the justices and the council, the marshal was charged but for an escape, and it was again well debated."

The two first of these cases, if they are not the same, are exactly alike in principle, and are cases of mainprise, which is not custody; so that the defendant was absolutely at large, and not even bound by recognizance to appear; for it does not appear, by the forms of entry of mainprise, that the principal enters into any obligation to appear; (4 Inst. 179, 180; Co. Ent. 51, c. 52, b, &c.,) there could be no reason, therefore, why a *capias* should not issue against the defendant upon his failing to appear at the day. But when a defendant is delivered to bail, he is still in law as much in custody as if he had remained in the custody of the sheriff. The sheriff was but his keeper, and so are his bail. A *capias* cannot regularly issue against a person who appears by the record to be in custody, 30 Assiz. 23. "If the return be *cepi corpus*, no new *exigent*, because in custody of record." Staundforde (P. C.) folio 70, letters E and F, (ed. 1538,) after stating the two cases from Fitz. Corone, 196, and *Exigent* 10, (as above,) says, "and see 30 in the book of assize, 23, where, in an appeal of death, the sheriff returned *cepi corpus*, and at the day had not the body, for which he was amerced, and was commanded to have the body, and so two or three times, and nothing was done; wherefore the plaintiff prayed an *exigent*, for he said the prisoner had escaped as the sheriff was bringing him to gaol, and the justices answered that they would not award the *exigent* against one

who appeared to them to be in prison ; but they would command the sheriff to have the body, and if he return this escape, then the plaintiff shall have his prayer, and not otherwise."

The case from Fitz. Corone, 196, was the case of an escape of the defendant after rendering himself upon the *exigent*, and a new *exigent* was awarded ; but not till the escape was found by inquest. So that it seems to be settled, that, after a return of "*cepi*," the court will not award a new *capias* unless it appear of record that the defendant has escaped. The mere refusal of the sheriff to bring in the body is not evidence of an escape upon which the court can act ; so the refusal of bail to surrender their principal is not such evidence of his escape as to justify the court in issuing a new *capias*. For, by the common law, the bail were as liable to be amerced as the sheriff, for not bringing in the body at the day, and no more summary process was given to bring in the body of a defendant who was bailed, than to bring in the body of a defendant who appeared by the record to be in the custody of the sheriff. The custody of the bail is, in law, substituted for that of the sheriff, and they have the same power over the defendant to keep him and bring him into court. They are substituted for the common gaol. In the language of the customs of Normandy, they are "a living prison." After a return of "*cepi*," there can be no new *capias*, but in the case of escape appearing of record ; and there must be an entry on the roll sufficient to warrant the writ. There must be an "*ideo præceptum est*." Dyer, 211, *b*, *officium clerici pacis*, 37.

The cases we have been considering were cases of felony, and they show on their face that the doctrine for which they were cited is only applicable to such cases, and not to cases of misdemeanor. There is no case to be found, it is believed, in the books of reports, or of entries, or in the elementary treatises, in which a second *capias ad respondendum* was issued upon the same indictment, in a case of misdemeanor, while it appeared of record that the defendant was in custody either of the sheriff or of the bail.

There is a great difference in the proceedings in regard to felony and misdemeanor. In felony the first process is *capias*, then an *alias capias*, and then an *exigent* and outlawry. In misdemeanor, it is first a *venire facias*, then, if the defendant has lands, distress infinite ; if he has no lands, and the sheriff returns *nihil* upon the *distringas*, then a *capias*, *alias*, and *pluries*, and then an *exigent* and outlawry.

The common law was very careful of personal liberty. By that law all offences were bailable. (2 Inst. 189.) The exceptions have been introduced by various statutes ; and the reason

why bail is denied in cases of murder, &c., is that the offence is so enormous that the escape of the offender can never be compensated to the public by the bail being subjected to a pecuniary penalty. Blackstone (b. 4, c. 22,) says: "This commitment being only for safe custody, wherever bail will answer the same intention, it ought to be taken, as in most of the inferior crimes; but in felonies, and other offences of a capital nature, no bail can be a security equivalent to the actual custody of the person. For what is there that a man may not be induced to forfeit to save his own life? and what satisfaction or indemnity is it, to the public, to seize the effects of them who have bailed a murderer, if the murderer himself have escaped with impunity?" And again, he says: "But where the imprisonment is only for safe custody before the conviction, and not for punishment afterwards, in such cases bail is ousted or taken away, wherever the offence is of a very enormous nature; for then the public is entitled to demand nothing less than the highest security that can be given, namely, the body of the accused, in order to insure that justice may be done upon him, if guilty." And again, after designating the cases which are not bailable, and observing that the Court of King's bench can bail in all cases, he says: "And herein the wisdom of the law is very manifest. To allow bail to be taken commonly, for such enormous crimes, would greatly tend to illude the public justice; and yet there are cases, though they rarely happen, in which it would be hard and unjust to confine a man in prison, though accused even of the greatest offence. The law has, therefore, provided one court, and only one, which has a discretionary power of bailing in any case."

The inference from these passages is, that, in cases of "inferior crimes," bail "will answer the same intention" as "commitment," and is "equivalent to the actual custody of the person," or, at least, that such was the opinion of the legislature when they left those inferior cases liable to bail as at common law, deeming it better, for the good of society, that these offenders should have the chance of escape, by forfeiting their recognizances, than that they should be detained in actual prison until trial. Such also seems to have been the understanding of the legislature of Maryland when they passed the Act of 1780, c. 10, "to enable the sheriffs to take bail-bonds in certain cases," which enacts that it shall be lawful for sheriffs to take bonds of all persons taken by them on any criminal writ, for any offence less than felony, with security if they shall think it necessary; and that they shall be obliged to take such bail-bond, in a sum not exceeding £100, conditioned that the said criminal shall appear in court on the day the writ is returnable, attend the court from day to day, and

not depart therefrom without the leave of the said court; and in case the criminal shall not be considered by the sheriff sufficient for the sum aforesaid, and cannot find sufficient security, the sheriff "shall take him before a magistrate, to be dealt with agreeably to the law now in force;" and where there is a failure of performance of the condition of the bond, a writ shall issue for the recovery of the penalty, &c.; and, if the sheriff shall fail to take such bond, to be approved by the court, or to take the criminal before a magistrate to be dealt with according to law, he shall be liable to be proceeded against in the same manner as he would have been on his default in not bringing in the party according to his return, if that act had not been made.

This shows that the legislature supposed that a bond in the penalty of £100 was sufficient security in all cases less than felony; and instead of directing a new criminal writ to be issued against the defendant upon his default in not appearing, they have expressly directed that the writ shall be issued for the recovery of the penalty. And in the whole statute law of Maryland, including the English statutes, "introduced, used, and practised by the courts of law or equity" of that State, there is not a clause or a word which alludes to a second *capias ad respondendum* upon an indictment for misdemeanor, after arrest and bail upon a previous *capias* issued upon the same indictment. The Act of Assembly of October, 1780, c. 10, obliges the sheriff to take a bail bond in all cases less than felony, if tendered, and the security be sufficient. If a defendant, who has been arrested and given bail, is arrested again on a second writ, he is again entitled to bail; and so *toties quoties*; and it may be that he can never be brought to trial. So also if he should remove out of the jurisdiction of the court into another State or government, he could not be brought to trial, unless in case of escape and demand from the Executive, &c. These chances were, no doubt, calculated by the Parliament of England and the legislature of Maryland, when they were considering what cases should be bailable, and what should not. It is believed that at the time of the separation of this part of the District of Columbia from the State of Maryland, it was not the practice in that State to issue a second *capias ad respondendum* upon an indictment for misdemeanor, after arrest and bail upon a former *capias* issued upon the same indictment. No case of that kind has been cited. Mr. Mason, who was the first attorney of the United States for this District, had been long an eminent practitioner in the courts of that State, and if such had been the practice there, he would, undoubtedly, have introduced it here; but during the whole time he held the office here, he never issued, nor applied for, a second *capias* in such a case, although,

at every term there were cases of forfeited recognizances; and we all know that he was remarkably faithful and attentive to his duty, and accurate in all his forms of proceeding. Judge Kilty, also, who was the first chief judge of this district, and who was afterwards Chancellor of Maryland, was well conversant with the practice of the courts of that State, and had just revised and published a valuable edition of the laws of Maryland, yet he never suggested an idea of such a practice; and, until the present, no such case has occurred in this court. It is stated, however, upon very respectable authority, that such is the practice in some of the courts in Maryland.

The judge of the Baltimore criminal court (a court erected since the separation of this part of the District from Maryland) states that the practice of his court is, "for the prosecutor, at every term where the person charged does not attend, to call him on his recognizance, and, if he does not answer thereto, to call his security to bring in his principal. If the latter also makes default, the court enters judgment for the penalty, and execution is issued thereon against the parties, and a bench warrant on the presentment or indictment, as the case may be, is, as a matter of course, issued against the offender to bring him in. If he is taken, or his security brings him in, the penalty is generally released on payment of costs attending the proceedings to recover it." And, in reply to a letter from the attorney of the United States for this district, he says, "that our courts make no such discriminations as stated in your letter between recognizances taken before or after presentment and indictment;" "and if the party fails to give his personal appearance, our uniform practice is, and has always been since the days of Judges Chase and Martin, to call him on his recognizance, enter the forfeiture, and issue execution thereon, and renew the capias or bench warrant against the principal." "It is also our practice, when the principal is brought into court and stands committed, to release or remit the forfeited recognizance if the money has not been paid, on payment of the costs attending the forfeiture." He also says, "the judges of the county court, and some of the most experienced practitioners to whom I showed your letter, entirely concur with me in the foregoing, especially in that portion of it relating to the recovery of the penalty and renewing the process against the delinquent, notwithstanding the payment of the money."

The Attorney-General of Maryland, (Josiah Bayly, Esq.) in a letter to the Attorney of the United States for this district, dated Cambridge, Md., October 7, 1833, says:

"The practice of the courts in this judicial district for the last forty years has been, in all cases of presentments or indictments,

where the party charged has been bound in recognizance, to issue a warrant in the nature of a *capias*, returnable to the next term; or, in certain cases where the party can be taken during the term, or may elude the process of the court, a bench warrant, returnable immediately; and, if the party is arrested and brought up, the court compel a speedy trial, unless legal grounds exist for the continuance, and, in that case, they take recognizance with sufficient security, or commit. If the party has been bound to appear to answer a criminal charge before the finding a presentment or indictment, and such presentment or indictment is found at the term to which he is bound to appear, the court order him to be called, and if he does not appear, direct his recognizance to be forfeited, and a warrant in the nature of a *capias* to be issued, returnable to the next term. Upon the return of those warrants "*cepi*," a rule is laid on the sheriff to bring the body in court by a certain day during the term, and, on failure to comply with the rule, the sheriff is amerced in a sum sufficient to enforce obedience, or inflict punishment for neglect of duty; and if the party can be found, a warrant in nature of a *capias* is renewed, or a bench warrant, as the nature of the case may require." After giving his opinion upon the construction of the Act of October, 1780, c. 10, and some other points, he says:

"In all cases where the sheriff brings the party into court under the rule laid for that purpose, the court either take the party's recognizance with security, or commit, if he be not ready for trial. If the party does not appear, according to the condition of the recognizance, it is forfeited, and a warrant in the nature of a *capias* renewed by order of the court, or the attorney, to answer the charge in the presentment or indictment in the same manner, and the same proceedings are had, as if he had never recognized. Similar proceedings are adopted, if the party escape after commitment, although the sheriff may be punished for suffering the escape."

A gentleman of the bar (Mr. Thomas F. Bowie,) in Upper Marlborough, in a letter dated 4th October, 1833, to the attorney of this district, says: "I have taken some pains to ascertain the practice of this court in reference to the question proposed in your letter, and the practice has been, whenever the sheriff has arrested an individual upon criminal process issuing on a presentment or indictment, and taken a bail-bond, if the person arrested does not appear, new process invariably issues to bring him in, and he is tried under the same indictment."

Mr. O. H. Williams, who, I suppose is clerk of Washington county, Maryland, states that he has not been able to find, and does not recollect, a case in that county, of a new writ issuing on

a presentment or indictment where the first writ was returned *cepi*, the party recognized, and the recognizance forfeited ; but the practice in such case has been to enter the case on the criminal docket " discontinued."

Mr. Schley, the clerk of Frederick county, Maryland, does not recollect any particular case in point.

It is stated by the counsel for the defendant, that it appeared, upon inquiry of the clerks of Charles and St. Mary's counties, in Maryland, that there was no such practice in their courts.

The practice in Maryland, therefore, is not even now universal or well settled, and no case has been shown by which it is established. If there be such a practice in any of the courts, it may have been caused by not distinguishing between the recognizances taken by justices of the peace before presentment, and those taken by way of bail upon a criminal writ issued upon a presentment or indictment. The presentment or indictment is a new cause of bail, unconnected, it may be, in fact, and certainly unconnected by the record, with the previous arrest by the magistrate's warrant ; but a second writ upon the same indictment, is for the same cause of arrest, and if the defendant has once given sufficient bail, and is, in law, in custody, it seems to me contrary to all the analogies and rules of the common law to require him to give bail again. In cases of felony, it may, perhaps, be done, because felony is not, in general, bailable, and the party has no absolute right to be bailed ; but even in cases of felony I find no positive law, nor any decided case to justify it.

As, therefore, it had never been done by this court in a case of misdemeanor ; as there was no order of the court to justify it ; as I could find no form of such an entry in any of the books of entries ; as I could find no case reported in which it was ever allowed, or in which a second recognizance for the same offence, has ever been estreated into the exchequer ; as there is no such rule stated in any of the elementary treatises upon the criminal law ; and as it seemed to me to be contrary to the analogies and the spirit of the common law, I cannot but think myself to have been fully justified in discharging the defendant upon the *habeas corpus*.

If, however, I have erred in my view of the law, that error may have arisen from my desire, upon all occasions, to support those principles of the common law which our ancestors claimed as their birthright, and which are the surest guards of personal liberty ; and no one will rejoice more than myself to see my errors corrected.

Ex parte JOHN B. GORMAN.

If a witness, summoned by a justice of the peace of Washington county, to attend before him and testify in a suit for a small debt, fail to attend accordingly, the justice may issue an attachment returnable to the circuit court, who will impose the penalty of two dollars and sixty-seven cents, as required by the 8th section of the Maryland Act of 1791, c. 68. The court cannot impose a higher fine.

MR. GORMAN was summoned by T. C. Coote, Esq., a justice of the peace to attend before him as a witness for the Corporation of Washington against Robert Crook ; and having failed to attend, the justice on the 11th of May, 1835, issued his attachment under the Act of Maryland of 1791, c. 68, § 8, returnable to this Court on the fourth Monday of May, instant, to which day this Court stood adjourned.

Mr. Gorman answered on oath, but did not purge himself of the contempt. The act authorizes the justices, at their discretion, to fine the offender any sum, not exceeding twenty shillings, current money, for every such offence.

The attachment was as follows :

District of Columbia, Washington county, ss. You are hereby commanded to attach John B. Gorman, and have him before the Circuit Court of the District of Columbia, for Washington county, on the fourth Monday of May, instant, to answer unto the United States of America, for a contempt by him committed, in not attending as a witness for the Mayor, Board of Aldermen, and Board of Common Council of the city of Washington, against Robert Clarke, before the subscriber, a justice of the peace in and for the said county, after being thereto legally summoned.

Hereof fail not. Given under my hand and seal this 11th day of May, 1835.

CLEMENT T. COOTE, [SEAL.]

The COURT (*nem. con.*) imposed the fine of two dollars and sixty-seven cents, (being twenty shillings, Maryland currency.) And CRANCH, C. J., said that he was of opinion that, as the case before the justice appeared by the attachment to be a case of small debt, recoverable in the manner provided for by the Act of 1791, c. 68, the punishment of the witness could not be extended beyond that prescribed by that act.

LINTHECUM v. JONES.

An execution cannot now be quashed at this term, which is not returnable until the next term.

THIS was a rule to show cause why a *fieri facias*, returnable at

the next term, should not be quashed, because the judgment was of more than twelve years' standing.

The COURT did not decide the principal question intended to be raised, being of opinion that the execution should not now be quashed.

MORSELL, J., was of opinion that execution should be quashed.

THRUSTON, J., thought that the Court had jurisdiction now to quash the execution although not returnable until the next term; but that the defendant ought to have an opportunity to plead the statute of limitations.

CRANCH, C. J., was of opinion that the Court now, at this term, has no jurisdiction to quash the execution, which is not returnable until the next term.

Motion to quash, overruled.

UNITED STATES v. OWEN McMAHON.

A foreigner is not entitled to a jury *de medietate*, in Washington county, D. C.

Upon a trial for murder, evidence will not be admitted that another person confessed himself to be the murderer.

A person conscientiously opposed to capital punishment was found "not indifferent," by the triors.

INDICTMENT for the murder of Henry Howard.

Mr. Brent, for the prisoner, asked for a jury *de medietate lingue*.

The COURT (THRUSTON, J., absent,) refused. See the Maryland Act of 1789, c. 22, § 5.

Upon the trial, *Mr. Brent*, for the prisoner, offered to prove that another person confessed that he killed the deceased; and that person had fled.

The COURT (THRUSTON, J., absent,) rejected the evidence. Upon calling the jurors to the book to be sworn, Mr. James Friend, one of the panel, said that he was conscientiously opposed to punishment by death, and could not conscientiously find a man guilty of a capital offence.

Whereupon, *Mr. Key*, the Attorney for the United States, challenged him for favor. The two first sworn jurors were sworn as triors, "well and truly to try whether James Friend stands indifferent between the United States and the prisoner at the bar;" and they found that he did not; having heard the declaration which he had just made to the Court; and thereupon he was set aside.

At 10 o'clock, P. M., the jury found the prisoner "guilty of

United States v. Gorman.

manslaughter in a most aggravated case; and not guilty of murder."

The sentence of the Court was eight years' labor in the penitentiary.

UNITED STATES v. J. B. GORMAN.

The power, given to the Corporation of Washington city, by its charter of 1820, "to provide for licensing, taxing, and regulating" "vendors of lottery tickets;" and the power, given by the same section of the same charter "to restrain or prohibit" "lotteries," and the by-laws of January 4th, 1827, and July 12, 1831, seem to have repealed the 2d section of the Act of Maryland of 1792, c. 58, so far as it was in force in the city of Washington.

THIS was an indictment, under the 2d section of the Maryland law of 1792, c. 58, for offering to sell and actually selling a ticket in a lottery "not authorized by the legislature of the State of Maryland, nor by the Congress of the United States, called the Delaware and South Carolina consolidated lottery," against the form of the statute, &c.

Mr. Jones, for the defendant, contended that the charter of the city of Washington repealed the second section of the Maryland law of 1792, c. 58, adopted by the Act of Congress of the 27th February, 1801, [2 Stat. at Large, 103,] concerning the District of Columbia, so far as it was applicable to the city of Washington.

By that section of the Maryland law, it is enacted, that if any person shall sell, or offer for sale, within that State, any ticket in any lottery not authorized by the legislature of that State, or by the Congress of the United States, he shall forfeit for every such ticket sold, or offered for sale, £10 current money, to be recovered by bill of indictment.

By the seventh section of the charter of the city of Washington, power is given to the corporation, "to provide for licensing, taxing, and regulating," "vendors of lottery tickets," and "to restrain or prohibit lotteries."

On the 4th of January, 1827, the corporation passed a by-law "to restrain and prohibit certain lotteries." The first section forbids private lotteries; the second prohibits the drawing of any lottery not authorized by act of Congress, or of the corporation. The third section provides that no licensed vendor of lottery tickets, or other person, shall sell any ticket in any lottery not specially permitted and authorized by some law of some State or Territory of the United States, or law of Congress of the United States, or act of the corporation, under the penalty of the \$50 for every offence, &c.

The by-law of July 12, 1831, prohibits the exercise of the business of lottery-ticket vendor without license, for which \$100 must be paid.

Mr. Jones cited *Hawkins v. Cox & Smith*, in this Court in June, 1819, (2 Cranch, C. C. 173,) and *Thompson v. Milligan*, in June term, 1820, (Ib. 207.)

Mr. Key, contra. The charter of 1820, § 7, has no negative words; it is all affirmative, and not inconsistent with the then existing law; both may stand together; both may prohibit the same thing under different penalties. The corporation has power to license and regulate vendors of lottery tickets; but only to restrain and prohibit, not license, lotteries. In the great lottery case of the *Corporation of Washington v. Clarke*, (in the Supreme Court,) it was admitted on all hands, that the power given to the city did not repeal the law of Maryland. Congress might have repealed the law of Maryland, and might have given that power to the city; but the question is, have they given it, and whether the corporation has exercised it. Has Congress given the city the power to license all sorts of lottery tickets? They could not mean to give the city the right to license the sale of illegal tickets; but only tickets vendible by law. There were tickets, the sale of which was lawful.

The same power is given over gaming; which, this Court has decided, did not repeal the general law of the land against gaming; and that the power was cumulative, so that the party may be liable to the Maryland penalty and the city penalty both. If the corporation had the power to repeal the Maryland law, they have not yet exercised it. They have not said what tickets it should be lawful to sell. The corporation had only power to license and tax the business of a vendor of lottery tickets; not to authorize the sales of tickets, the sale of which was prohibited by law. It is not like the case of tavern licenses; for in that case there was nothing left for the Maryland law to operate upon.

Mr. Jones, in reply. It is not necessary to contend that this charter repeals the Maryland law; the only question is whether the corporation has not the power to license the sales of such tickets in the city.

The COURT (CRANCH, C. J., not giving any opinion, as he wished to consider the several charters and by-laws, and the cases already decided by this Court,) stopped *Mr. Jones*, saying they were satisfied that the license of the corporation authorized the sale.

ISAAC S. NICHOLLS v. CORPORATION OF GEORGETOWN.

If the business of selling lottery tickets is lawful, the Corporation of Georgetown has not power to restrain it; if unlawful, no power to license it.

THIS was a motion or petition for a *certiorari* to bring up a prosecution pending before the mayor of Georgetown, D. C., for a penalty of \$20 for selling a lottery ticket on the 27th of April, 1835, without a license from the corporation; half to the informer, half to the corporation, under a by-law of the 21st of February, 1835. Judgment below May 9, 1835, for the penalty and costs.

Mr. Brent, for the plaintiff, (Nichols.) The corporation can only exercise powers specifically given and such as are necessary to the exercise of those expressly given. No power is given by its charter to license the sale of lottery tickets. It has power to restrain and prohibit gambling, but not to license it. The charters of Washington and Alexandria give the specific power to license vendors of lottery tickets, but no such power is given to Georgetown.

Mr. Dunlop, contra. The charter of 1805, § 12, gives the power "to restrain or prohibit gambling." This is a species of gambling; and as it may be restrained it may be licensed. The tax operates as a restraint. *State v. Smith*, and *State v. Lane, Yerger*, 272. Buying and selling tickets is gaming.

The COURT (THRUSTON, J., absent,) was of opinion, that if the business of vending lottery tickets was lawful, the corporation had no power to restrain it; if unlawful, no power to license it.

UNITED STATES v. LEWIS G. DAVIDSON and I. W. STRATTON.

Upon a joint indictment against two, for assault and battery, it is not a matter of right that they should be tried separately, at their request; and neither can be examined as a witness for the other unless there be no evidence against one; in which case the jury may acquit him, and then he may be examined for the other defendant.

INDICTMENT for assault and battery on a negro, a servant at Fuller's Hotel.

Mr. Brent, for the defendants, asked that they might be tried separately, as he wished to examine each as a witness for the other.

The COURT said that it was perhaps in the discretion of the Court to allow it, but that the defendants could not claim it as a matter of right; and that neither can be examined as a witness

Caldwell v. Walters.

for the other unless it should appear that there was no evidence against one; in which case the jury may acquit him, and then he may be examined for the other; but if there be any evidence against him he cannot be examined. 1 Chitty, Cr. L. 626, 627.

UNITED STATES v. WILLIAM JACKSON.

The person, to the prejudice of whose right a forgery is averred to be, is a competent witness to prove the forgery; so also is the person whose receipt is averred to be forged.

INDICTMENT for forging a bill and receipt of Polkinhorn & Campbell against Major William T. Barry, of eight dollars and fifty cents, for a trunk, by altering the amount, which was originally \$6.50 to \$8.50.

The deposition of Major Barry had been taken by consent, provided he could be a competent witness, and was now produced by *Mr. Key* for the United States.

Mr. Brent, for the defendant, objected that he was interested; and cited the case of the *United States v. John Anderson*, in this Court at November term, 1834, (*ante*, 476,) and the cases there cited.

The COURT (*nem. con.*) decided, that Major Barry was a competent witness, and his deposition was read.

Mr. Key then offered Messrs. Polkinhorn and Campbell.

Mr. Brent objected.

But the COURT overruled the objection and they were examined.

The indictment charged the forgery to be to the prejudice of the right of the said W. T. Barry, and with intent to defraud him, under the eleventh section of the Penitentiary Act of 1831.

TIMOTHY CALDWELL v. WALTERS, Executor of Moore.

If the answer be filed in term-time the Court will hear a motion to dissolve the injunction at any time upon reasonable notice. Three days' notice, left at the office of the complainant's solicitor, in his absence from town, is reasonable.

THE bill was filed and injunction granted by CRANCH, C. J., on the 18th of May, 1835. On the 3d of June the answer was filed, and on the same day notice of motion to dissolve on this day was left at the office of Z. C. Lee, the complainant's solicitor, *Mr. Lee* being then absent from this city.

Davidson v. Donovan and Chesapeake and Ohio Canal Company.

Mr. Coxe now moved for dissolution, *Mr. Lee* not being present, and, as it was said, not in the city.

Mr. Coxe said, that according to the rule of this Court, or a former decision of this Court, when the answer is filed in term-time, the Court will hear a motion to dissolve at any time, upon reasonable notice. *CRANCH, C. J.*, said he had no recollection of such a decision; but, *MORSELL, J.*, said there was such an one.

The COURT (*CRANCH, C. J., contra*,) said the notice was reasonable, and took the bill and answer to consider the motion; and afterward dissolved the injunction.



DAVIDSON v. DONOVAN AND CHESAPEAKE AND OHIO CANAL COMPANY, Garnishees.

An attachment of credits in the hands of the Chesapeake and Ohio Canal Company, is sufficiently served by notice to the clerk of the company.

Mr. Marbury, for the garnishees, contended that the service of the attachment by a notice to the clerk of the company was not sufficient, because he was not the proper officer to be summoned; and because not served in the presence of two witnesses.

The attachment was also served upon *W. Gunton*, one of the directors. This was also objected to by *Mr. Marbury*, who contended that the service should have been upon the president of the company.

Mr. Woodward, the deputy-marshal, testified that he had been in the habit of always serving the process on the president and directors, until they directed him to serve process on their clerk, which they said would be sufficient.

The COURT (*nem. con.*) was of opinion that the service of the attachment on the canal company, by giving the notice to *Mr. Ingle*, their clerk, as the officer, *Mr. Woodward*, was requested to do by the president and directors, was a sufficient service.

CIRCUIT COURT OF THE UNITED STATES

OCTOBER TERM, 1835, AT ALEXANDRIA.

UNITED STATES *v.* NEGRO NELSON.

A slave, convicted of larceny, is to be punished by whipping, although not charged as a slave in the indictment.

THE prisoner was convicted of stealing a hair cap, of the value of one dollar and twenty-five cents.

It appeared, in evidence, that he was a slave, although not charged as such in the indictment.

The COURT (*nem. con.*) sentenced the prisoner to be whipped with twenty stripes.

UNITED STATES *v.* JOSEPH BOLING.

An indictment must conclude against the government of the United States.

INDICTMENT for robbery ; against the peace of the United States.

Motion in arrest of judgment, because the indictment did not conclude against the government of the United States. See the Act of Congress of March 3d, 1801, § 2, [2 Stat. at Large, 115,] "supplementary," &c.

The COURT (*nem. con.*) arrested the judgment.

NEGRO RACHEL BRENT *v.* JOHN ARMFIELD.

A person cannot be a resident of two States at the same time.

In order to protect the title of a sojourner to his slave, brought in under the 4th section of the Maryland Act of 1796, c. 67, it is not necessary that he should bring the slave with him.

The title of the defendant to the slave is not protected by the 4th section of the act, if he suffer the slave to remain two years after he himself has returned.

THIS was a petition for freedom.

The defendant claimed under Mr. Ariss Buckner, of Virginia.

The petitioner claimed freedom by having been brought into

Mason v. Mansfield.

the county of Washington, D. C., by Mr Buckner, from Virginia, to reside, or for sale, contrary to the 1st section of the Maryland Act of 1796, c. 67.

The defendant claimed a right to bring in his slaves, under the 2d section of the act; as being a person coming into Washington with a *bonâ fide* intention of settling therein; and if not with intention to settle in Washington, he claimed the right, under the 4th section, as a sojourner.

The COURT, (THRUSTON, J., absent,) at the prayer of *Mr. Key*, for the petitioner, instructed the jury that Mr. Buckner could not be a settled and *bonâ fide* resident in Virginia and Washington at the same time, within the meaning of the 2d section of the act; and that, in order to find for the defendant upon that section, they must be satisfied, by the evidence, that when he removed to Washington he intended to renounce his residence in Virginia, and become a *bonâ fide* resident of another place.

Mr. Taylor then prayed the Court to instruct the jury, that if, from the evidence aforesaid, the jury should believe that the said Ariss Buckner removed to Washington as a sojourner, then he was not entitled, under the 4th section of the Maryland Act of 1796, c. 67, to import the petitioner, unless he brought her with him for his own use at the time of his removal.

Which instruction, the COURT refused to give; but, at the prayer of *Mr. Key*, for the petitioner, instructed the jury in substance, that the defendant was not protected under the said 4th section of that act, if the said Ariss Buckner returned and removed his family to Virginia in December, 1830, and left the petitioner hired out in Washington till June, 1832, and did not attempt to remove her until that time when he sent for her.

Mr. Key, for the petitioner. *Mr. Taylor*, for the defendant.

Verdict for the petitioner.

RICHARD B. MASON v. CHARLES MANSFIELD.

If a master of a vessel navigating the Potomac, in the usual course of navigation, anchors in the plaintiff's fishing ground, without malice, for the purpose of taking in the residue of the cargo; and when required to depart, his not doing so immediately be not attributable to malice, but to a reasonable cause, and he removed his vessel as soon as the circumstances of wind, weather, and tide would permit, he is not liable for damages.

But if the defendant, knowingly and without necessity or reasonable commercial purpose, anchor his vessel within the limits of the plaintiff's fishery so as to interrupt the same; or if the defendant, having so anchored his vessel within the said limits, knowingly, and without necessity, or any reasonable commercial purpose, remained within the same, so as to interrupt the plaintiff's fishery, the plaintiff is entitled to recover.

THIS was an action on the case, for "that the defendant, not

ignorant of the premises, (that is, of the plaintiff's right of fishing,) but maliciously intending to injure the plaintiff in this behalf, and to deprive him of the use of his said fishery, did, on the day of and continually thereafter, for and during the space of days then next following, wrongfully and injuriously stop and anchor a certain vessel, then under the command of the defendant, in the berth and range of the said fishery, so that he entirely obstructed and hindered said fishery," &c.

Upon the trial of the general issue, *Mr. Neale*, for the defendant, prayed the Court to instruct the jury, that if they should believe, from the evidence, that the defendant pursued the usual course of navigation when he entered the berth of the plaintiff's fishery, and that he anchored his vessel in the channel for the purpose of taking in the residue of his cargo, and not with the malicious intent to injure the plaintiff's right of fishery; and that when required to depart thereout, his not doing so immediately, was not attributable to any malice on his part towards the plaintiff, but for the reasons stated in the deposition of the mate, and that he removed his vessel as soon as wind, weather, and tide would permit; then they will find for the defendant.

Mr. Taylor, for the plaintiff, contended that it was not necessary for the plaintiff to prove malice, although it is averred in the declaration.

But the COURT gave the instruction as prayed.

MORSELL, J., *contrà*, being of opinion that malice was not the gist of the action, and therefore need not be proved.

Mr. Neale cited *Harman v. Tappenden*, 1 East, 562; 1 Chitty, 146; *Reynolds v. Kennedy*, 1 Wils. 233; *Goslin v. Wilcock*, 2 Id. 305.

Mr. Taylor, *contrà*, cited 1 Chitty, 129, 130, 376; 4 Starkie, 418; *Williamson v. Allison*, 2 East, 446; *Peppin v. Solomons*, 5 T. R. 496; *Bristow v. Wright*, Doug. 665; *Barrett v. Willes*, 4 Leigh, 114.

The COURT, (*nem. con.*) at the prayer of *Mr. Taylor* and *Mr. Mason*, for the plaintiff, instructed the jury, that if they should be satisfied by the evidence, that the defendant knowingly and without necessity, or any reasonable commercial purpose, anchored his vessel within the limits of the plaintiff's fishery, so as to interrupt the same; or that the defendant, after he had anchored within the limits of the plaintiff's fishery as aforesaid, knowingly, and without necessity, or any reasonable commercial purpose, remained within the same, so as to interrupt the fishery, then the plaintiff is entitled to recover.

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1835, AT WASHINGTON.

JULIA REED, *Ex parte*, on *Habeas Corpus*.

Fines, penalties, and forfeitures, under by-laws of the corporation of Washington, not exceeding \$50, are recoverable before a justice of the peace.

There does not appear to have been given to the corporation of Washington, by any of its charters, or the amendments thereof, any authority, directly, to punish any free persons corporally for the breach of its by-laws.

It can only impose fines, penalties, and forfeitures, for the violation of its ordinances, to be recovered as debts.

The only case in which labor may be added to imprisonment for the non-payment of a fine, is that of a free negro, or mulatto, who has been convicted of being present at a disorderly meeting, and who is unable to pay the fine; for if he is able to pay, it may be recovered by the ordinary process of execution.

If unable to pay in money, it was intended, by the charter, that he should pay in labor; and he could not be forced to labor, unless confined; hence, it was provided, that he should be confined to labor, instead of a simple imprisonment upon a *ca. sa*.

It was not so much intended as a punishment, as a means of recovering the penalty.

In all cases of the breach of the by-laws, the prosecution is by an action of debt, and the judgment can only be for the fine, penalty, or forfeiture.

In ordinary cases the execution to enforce the payment is a *ca. sa.*, *fi. fa.*, or attachment.

In the case of the inability of a free negro or mulatto to pay the fine for the offence of disorderly meeting, it may be by commitment to labor for a limited time; the difference is not in the judgment, but in the execution.

In all cases the prosecution is for the recovery of the penalty.

A fine or penalty, incurred by the breach of a by-law, is a debt, and recoverable as such.

The corporation of Washington has authority, under its charter, to require security for good behavior, of persons guilty of grossly indecent language or behavior publicly in the streets; and to cause them to be confined to labor, if they refuse, or are unable to give the security required; and the justices of the peace, individually have authority to require the security, and to commit for want of it; but the indecent language, or behavior, must be publicly in the streets.

That part of the by-law which requires security to be given by persons guilty of simple "profane or indecent language or behavior," is not warranted by the charter, and is void; but so far as it requires security to be given by "disorderly persons," it is valid.

The warrant of commitment should state that the party was required to give the security, the amount of the security required, and for what period of time, so that it may appear that the amount and time were reasonable.

The commitment may be to labor, but not to hard labor.

THIS was a writ of *habeas corpus*, commanding Richard Butt, superintendent of the Washington Asylum, to bring up the body

Ex parte Julia Reed.

of Julia Reed with the cause of her commitment and detainer ; and, upon the return, it appeared that she was committed and detained by virtue of the following warrant :

“District of Columbia, county of Washington, to wit : To L. S. Beck, constable of the second ward of the city of Washington, and Richard Butt, intendant of the Washington Asylum.

“Whereas Julia Reed stands convicted before me, the subscriber, a justice of the peace of the county aforesaid, on the oath of John W. Dexter, with being a disorderly person, and having, on the 12th of November, used indecent and profane language, on Fourteenth Street, in the city of Washington and county aforesaid ; and having failed to give security for her good behavior ; you are, therefore, hereby commanded to take the said Julia Reed into your custody, and deliver her, together with this warrant, to the intendant of the asylum ; and you, the said intendant, are hereby required and authorized to receive the said Julia Reed, and her safe keep at hard labor for the space of sixty days from and after the date hereof, unless sooner discharged by due course of law. Given under my hand and seal this 13th day of November, 1835. Samuel Stittinius, Justice of the Peace.”

This warrant was issued under the by-law of the corporation of Washington of the 16th of December, 1812 ; by the sixth section of which it is enacted “That all vagrants, idle and disorderly persons, persons of ill fame, persons likely to become chargeable to the corporation as paupers, persons found begging or drunk in or about the streets or loitering in or about tippling houses ; all suspicious persons, persons who have no fixed place of residence or cannot give a good account of themselves, persons guilty of profane or indecent language or behavior, shall, on information made before any justice of the peace, as aforesaid, by a credible citizen, be required to enter into security for good behavior, for a reasonable time, and indemnify the corporation against any charge for their support ; and in case of refusal, or inability to give such security, they shall be confined to labor for a time, not exceeding ninety days, unless such security be sooner given ; and the same proceedings shall be had against such person or persons so offending, for each and every offence.”

This by-law was passed under the supposed authority of the sixth section of the amended charter of the 4th of May, 1812, which, among other things, gives the corporation power and authority “to cause vagrants, idle or disorderly persons, all persons of evil life or ill fame,” &c., and “all who are guilty of open profanity or grossly indecent language or behavior publicly in the streets,” &c., “to give security for their good behavior for a reasonable time, and to indemnify the city against any charge for

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their support ; and in case of their refusal, or inability to give such security, to cause them to be confined to hard labor for a limited time, not exceeding one year at a time, unless such security should be sooner given."

Mr. Dermott and *Mr. Dandridge*, for the prisoner, contended,

1. That the justice of the peace had no jurisdiction of the offences created by the by-laws of the corporation.

2. That he had no authority to send a white person to the asylum ; and the commitment does not state that the prisoner was a colored woman.

3. That the corporation has no judicial powers unless given by the charter, and cannot erect judicial tribunals, nor designate certain justices of the peace to execute their by-laws, nor exercise any other powers not expressly given by the charter, or necessary for the execution of powers expressly given.

4. That the warrant of commitment was void, because not under seal.

Mr. Bradley, contra, contended that the fines, penalties, and forfeitures under the by-laws, were debts, and recoverable like any other debts, that is, before a justice of the peace, if not exceeding twenty dollars, (which was then the limit of his jurisdiction as to value,) and before the Circuit Court when the debt exceeded that value ; and the magistrate acted ministerially in taking security for good behavior, &c.

CRANCH, C. J., delivered the opinion of the Court, as follows :

By the Act of Congress of the 27th of February, 1801, § 11, [2 Stat. at Large, 103,] the justices of the peace for the respective counties in the District of Columbia, in matters civil and criminal, and whatever relates to the conservation of the peace, have all the powers vested in justices of the peace, as individual magistrates by the laws therein before continued in force, &c., and in personal demands to the amount of twenty dollars. By the charter of 1802, [2 Stat. at Large, 195,] § 7, the corporation of Washington had power to pass by-laws and ordinances upon certain subjects, and to impose fines, penalties, and forfeitures for the breach of their ordinances ; and to pass all ordinances necessary to give effect and operation to all the powers vested in the corporation. And all fines, penalties, and forfeitures under twenty dollars, were to be recovered before a single magistrate, as small debts were by law recoverable ; and if over twenty dollars, by action of debt in the Circuit Court of the district for the county of Washington, in the name and for the use of the corporation. These provisions of the first charter were continued until 1820. By the first section of the charter of 1820, the act granting the charter of 1802, the supplement of 1804, and the amendment of

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1812, and all other acts, or parts of acts, inconsistent with the charter of 1820, were repealed ; provided that all acts and things done, or which then might be done by the corporation in pursuance of the provisions of the said acts, and not inconsistent with the provisions of the Act of 1820, were to remain valid, as if that act had never been passed.

The charter of 1802 gave no power to inflict corporal punishment for the breach of any ordinance ; nor did the supplementary Act of 1804. The sixth section of the amendment of the charter in May 1812, authorized the punishment of the offence of nightly and other disorderly meetings of free negroes and mulattoes, by fixed penalties, not exceeding twenty dollars for any one offence ; and in case of inability to pay the penalty and costs, authorized confinement to labor, (not hard labor,) for such reasonable time, not exceeding six months for any one offence, as should be deemed equivalent to such penalty and costs. It also authorized the corporation "to cause all disorderly persons," "and all who are guilty of open profanity or grossly indecent language or behavior publicly in the streets," "to give security for their good behavior for a reasonable time, and to indemnify the city against any charge for their support ; and, in case of their refusal or inability to give such security, to cause them to be confined to labor for a limited time, not exceeding one year at a time, unless such security should be sooner given." The same act authorized the punishment of slaves, for disorderly meetings, by whipping or imprisonment. The same act of 1812 first gave the corporation authority "to erect and establish workhouses, houses of correction and penitentiary buildings" for the use of the city. It does not expressly designate the manner in which the offence of "open profanity, or grossly indecent language or behavior publicly in the streets," shall be ascertained ; nor who shall require the security, and commit to the confinement to labor. But, by the seventh section of the act, the marshal is to receive and safely keep within the gaol for Washington county, at the expense of the city, all persons committed thereto, under the sixth section of the act, until other arrangements should be made by the corporation for the confinement of offenders within the provisions of the said section ; and it provides "that in all cases where suit shall be brought before a justice of the peace, for the recovery of any fine or penalty, arising from or incurred for the breach of any by-law or ordinance of the corporation, upon the return of *nulla bona* to any *fi. fa.* issued against the property of the defendant or defendants, it shall be the duty of the clerk of the Circuit Court for the county of Washington, when required, to issue a *ca. sa.* against every such defendant, returnable to the next Circuit Court for the county of Washington, there-

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after, and which shall be proceeded on as in the other writs of the kind."

By the charter of 1820, § 7, the corporation is authorized "to impose and appropriate fines, penalties, and forfeitures for the breach of their laws or ordinances, and to provide for the appointment of inspectors, constables, and such other officers as may be necessary to execute the laws of the corporation." But the persons who are to execute those offices, are, by the 3d section, to be appointed by the mayor, with the consent of the board of aldermen. By the 8th section, the corporation has authority "to establish and erect watch and work houses, houses of correction, and penitentiary and other buildings," to punish nightly and other disorderly meetings of free negroes and mulattoes, by penalties not exceeding \$20 for one offence; and, if unable to pay, to cause the offenders to be confined to labor, (not hard labor,) for any time not exceeding six calendar months; "to cause all who shall be guilty of open profanity, or grossly indecent language or behavior, publicly in the streets, to give security for their good behavior, and to indemnify the city against any charge for their support; and in case of their refusal or inability to give such security, to cause them to be confined to labor until such security shall be given; not exceeding, however, one year at a time;" "to punish, corporally, any colored servant or slave for a breach of any of their laws or ordinances, unless the owner or holder of such servant or slave shall pay the fine in such cases provided; and to pass all laws which shall be deemed necessary and proper for carrying into execution the powers vested by this act, (the charter of 1820,) in the said corporation or its officers." And by the 9th section, the marshal of the District of Columbia is "to receive and safely keep, within the gaol of the county of Washington, at the expense of the said corporation, all persons committed thereto under or by authority of the provisions of this act. And in all cases where suit shall be brought, before a justice of the peace, for the recovery of any fine or penalty arising or incurred for a breach of any law or ordinance of the corporation, execution shall and may be issued as in all other cases of small debts."

These are all the provisions of the Acts of Congress which affect the present case; and there does not appear to have been given to the corporation, by any of its charters, or the amendments thereof, any authority, directly, to punish a free person, corporally, for the violation of its by-laws. They can only impose fines, penalties, and forfeitures for the breach of their ordinances, to be recovered as debts. The only case in which labor may be added to imprisonment, for non-payment of the fine or penalty,

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is that of a free negro or mulatto who has been convicted of being present at a disorderly meeting, and who is unable to pay the fine; for, if he is able to pay, the fine may be collected by the ordinary process of execution. If unable to pay in money, it was intended, by the charter, that he should pay in labor; and he could not be forced to labor unless confined. Hence, it was provided that he should be confined to labor, instead of simple imprisonment upon a *ca. sa.* It was not so much intended as a punishment as a means of recovering the penalty. A free negro or mulatto, who is able to pay his fine, cannot be confined to labor for any violation of a by-law of the corporation.

So, in the case of a violation of a by-law, by a colored servant or slave, the magistrate, upon conviction, must give judgment for the fine or penalty; and if the owner or holder of such servant or slave shall pay the fine, there can be no corporal punishment.

In all cases of breach of the by-laws, the prosecution is by an action of debt, and the judgment can be only for the fine, penalty, or forfeiture.

In ordinary cases, the execution, to enforce the payment, is a *ca. sa.*, or *fi. fa.*, or attachment; in the case of the inability of the free negro or mulatto to pay the fine for the offence of disorderly meeting, it may be by commitment to labor, for a limited time; and in the case of a colored servant or slave, it may be corporal punishment, if the owner or holder will not pay the fine. The difference is not in the judgment, but in the execution. In all cases the prosecution is for the recovery of the penalty.

Such being the case, there is no difficulty in supporting the jurisdiction of the justices of the peace, in the recovery of these penalties.

By the charter of 1802, § 7, all the fines, penalties, and forfeitures imposed by the corporation, if not exceeding \$20, (which was then the extent of the jurisdiction of a justice of the peace, in small debts,) were expressly directed to be recovered before a single magistrate, as small debts, were then, by law, recoverable; and if exceeding that amount, by action of debt, in this Court, in the name and for the use of the corporation. This provision of the charter was in force when the Act of the 15th of May, 1820, [3 Stat. at Large, 183,] was passed, and was not repealed by the first section of that act, which purports to repeal only such previous acts and parts of acts as were inconsistent with the provisions of that act, namely, the Act of 15th May, 1820. This provision, designating the mode of the recovery of fines, penalties, and forfeitures imposed by the corporation, and giving jurisdiction to the justices of the peace, and to this Court, was not only not inconsistent with the provisions of the Act

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of 1820, but seems to have been recognized by that act, as still existing.

Thus, by the 3d section of that act, the mayor is, *ex officio*, to have and exercise all the powers, authority, and jurisdiction of a justice of the peace for the county of Washington, which would seem to be an almost nugatory grant of power, if a justice of the peace of the county of Washington had no cognizance of the breaches of the ordinances of the corporation.

So, also, in the 9th section, the marshal is required to receive and safely keep, within the gaol of Washington county, at the expense of the corporation, all persons committed thereto under the authority of the provisions of that act; that is, persons who might be committed upon *ca. sa.*, or for labor, or for want of security in cases where the charter authorized the corporation to require security.

The same section also provides, "that in all cases where suit shall be brought before a justice of the peace for the recovery of any fine or penalty, arising or incurred for a breach of any law or ordinance of the corporation, execution shall and may be issued, as in other cases of small debts."

This last clause is an express recognition of the powers of the justice of the peace, and strongly implies that Congress believed that the powers given to the justice of the peace, by the first charter, still continued; for it is not expressly given by any of the provisions of the Act of 1820.

This inference is strongly corroborated by the other provisions just mentioned. Thus, why require the marshal to receive persons committed, if there was no authority to commit? Why give the corporation authority to require security from vagrants and others mentioned in the 8th section, if there was no magistrate to cite such persons before him, to give the security?

But if jurisdiction of suits for the recovery of these fines and penalties has not been given to the justices of the peace, and to this Court, by either of the charters, have they not jurisdiction by virtue of the powers and jurisdiction conferred by the Act of the 27th of February, 1801?

By the fifth section of that act, this Court has jurisdiction "of all cases, in law and equity, between parties, both or either of which shall be resident or found within the district."

The question whether a fine, or penalty, or forfeiture has been incurred under a by-law of the corporation, is as much a case at law as a question whether a man has violated his contract; and, whether it be a civil or a criminal case, it is still cognizable by this Court, if the amount of the fine or penalty is sufficient to sustain the jurisdiction.

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So also a fine or penalty incurred by a breach of an ordinance of the corporation, is a debt, and could always, be recovered at common law as a debt; and if the amount be small it is a small debt and comes within the jurisdiction of a justice of the peace; and by the eleventh section of the Act of the 27th of February, 1801, the justices of the peace have, in all matters civil and criminal, all the powers which justices of the peace then had; "and shall also have cognizance of personal demands to the value of twenty dollars, exclusive of costs."

The fine, penalty, or forfeiture, incurred by breach of a by-law, is a personal demand; and where the amount is less than twenty dollars, the Act of 27th February, 1801, expressly gives the cognizance to a justice of the peace. So that, either under the express provision of the charter of 1802, not repealed by that of 1820, or under the Act of 27th February, 1801, the jurisdiction, both of the justice of the peace, and of this Court, is very clear, so far as concerns the recovery of fines, penalties, and forfeitures, for breaches of the by-laws of the corporation, and the commitment for the non-payment thereof, and the confinement to labor in cases of inability to pay, where such commitment to labor is authorized by the charter.

But the case now before the Court, is not a case of commitment and confinement to labor for inability to pay a fine or penalty incurred for a breach of a by-law; it is for the failure to give security for good behavior, by a person whom the magistrate requiring the security has convicted, upon the oath of a witness, of being a disorderly person; and of having used indecent and profane language, on a public street in the city of Washington.

It is contended that the justice of the peace, who issued this warrant of commitment, had no jurisdiction of the case, and no power to commit for that cause.

By the eighth section of the charter of 1820, the corporation has power and authority to cause "vagrants, idle or disorderly persons," "and all who shall be guilty of open profanity, or grossly indecent language or behavior publicly in the streets," to give security for their good behavior, for a reasonable time, and to indemnify the city against any charge for their support; and in case of their refusal or inability to give such security, to cause them to be confined to labor until such security shall be given, not exceeding, however, one year at a time.

When the corporation has exercised the authority thus given them, by enacting by-laws and ordinances requiring security of such persons, those by-laws and ordinances are as much binding upon all persons within the corporate jurisdiction as if Congress itself had enacted them for the government of the whole district.

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If they had been thus immediately enacted by Congress there could have been no doubt that the justices of the peace would have had power to require the security, and, for that purpose, to cite such persons to appear before them, and upon their refusal or inability to give the security, to cause them to be confined to labor until such security should be given, not exceeding, however, one year at a time.

By the English statute of 34 E. 3, c. 1, justices of the peace are authorized, "to take of all them that be not of good fame, where they shall be found, sufficient surety and mainprise of their good behavior."

Although nearly five centuries have elapsed since that statute was enacted, the phrase, "not of good fame," has never been precisely defined, and much has been left to the discretion of the magistrate. But by a course of decisions, for a period of more than four hundred years, it has been extended to persons suspected to be dangerous, quarrelsome, or scandalous; "those who sleep in the day and go abroad at night," "such as keep suspicious company," "such as are generally suspected to be robbers, &c;" "eavesdroppers; common drunkards," "and all others whose misbehavior may be reasonably intended to bring them within the meaning of the statute as being contrary to good manners; such as haunting bawdy-houses with women of bad fame; keeping bad women in his house," &c.

This statute, with these expositions of it, was in force in Maryland on the 27th February, 1801, and constitutes a part of the authority and jurisdiction of the justices of the peace of this county, who have been appointed under the Act of Congress of that date.

The eighth section of the charter of 1820, so far as it regards security for good behavior, was evidently framed upon the statute of Edward 3d, and its judicial expositions; and, although somewhat enlarged, may be considered as substantially the same. If, then, Congress, instead of authorizing the corporation of Washington to require security in the cases stated in that section of the charter, had, itself, required the security, the justices of the peace would have had jurisdiction to carry the act into effect. But the by-law, enacted under the authority of the charter, is as valid a law as if it had been enacted by Congress, and the justices of the peace are equally authorized to enforce it.

That such was the understanding of Congress may be inferred from their not having designated any other officer or tribunal to require the security and to commit to labor for not complying with the requisition; and from their having required the marshal to receive and safe keep, in the county gaol, all persons commit-

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ted thereto under the authority of that act; for the provision would have been nugatory if there had been no authority to commit, nor any person liable to be committed.

We are, therefore, of opinion, that a justice of the peace of the county of Washington has authority under the charter, and the by-law of the 16th of December, 1812, to cause vagrants, &c., to be brought before him, and to require security for their good behavior, and to order them to be confined to labor, according to the provisions of the by-law, so far as they are authorized by the charters of 1802 and 1812, and not inconsistent with the new charter of 1820.

The sixth section of the by-law of 16th December, 1812, was passed under the authority of the sixth section of the amended charter of May 4th, 1812, which authorizes the corporation "to cause all disorderly persons," and "all who are guilty of open profanity, or grossly indecent language or behavior publicly in the streets," to give security, &c. But the by-law authorizes the justice of the peace to require security of all disorderly persons, and persons guilty of profane or indecent language or behavior, although the profanity be not "open," and the language or behavior neither "grossly" indecent, nor "publicly;" nor "in the streets." That part of the by-law which requires security to be given by persons guilty of simple profane or indecent language or behavior, is not warranted by the charter, and is void; but so far as it requires security to be given by "disorderly persons," it is warranted by the charter of 1812, and is not inconsistent with that of 1820.

The warrant of commitment, in the present case, states that Julia Reed stands convicted before the justice, on the oath of John W. Dexter, of being a disorderly person, and therefore states a good cause for requiring security according to the by-law; and it states that she failed to give security for her good behavior; but it does not state that she was required to give security; nor in what sum; nor for what period of time, so that it might appear that the sum and time were "reasonable," and that she might know what security to provide; for the confinement is not to be for any number of days or months absolutely, but, in the words of the charter of 1820, "until such security shall be given, not exceeding one year at a time." Nor does the warrant state that she refused, or was unable to give the security required.

The commitment also requires the intendant to keep her at hard labor. This implies a degree of labor more severe than that of ordinary, moderate, labor, and is not warranted by the by-law, or the charter. The labor was not intended as a punishment, but as the means of indemnifying the corporation for the expense of maintaining the person in confinement.

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For these errors and defects in the commitment, the Court is of opinion that the prisoner must be discharged.

THRUSTON, J., did not entirely concur in all the views of the subject stated in the opinion of the Court, particularly in regard to the exceptions taken to the form and terms of the warrant of commitment.

ROBERT OLIVER'S EXECUTORS v. SUSAN DECATUR.

A defendant who appears to a bill of revivor is not entitled to the benefit of the 6th and 10th rules of practice established by the Supreme Court of the United States, for the circuit courts ; but the Court will order the suit to stand revived unless cause be shown to the contrary in ten days.

THE complainant, Robert Oliver, died, and his executors filed a bill of revivor, and issued a *subpœna* which was returned served at the October rules, 1835, so that the appearance day was the first Monday in November.

Messrs. Key & Dunlop, the complainants' solicitors, moved the Court now to order the suit to stand revived.

Mr. Marbury, the defendant's solicitor, now entered his appearance for the defendant and claimed time (three months) to plead, answer, or demur, according to the rules of this Court, as prescribed by the Supreme Court of the United States in cases of original bills. See Rules 6 and 10.

In the English practice the same time is given to answer or plead to bills of revivor as to original bills ; and the rules, prescribed by the Supreme Court, make no difference. 2 Mod. Ch. Pr. 260, 534.

THE COURT (CRANCH, C. J., *contrà*,) ordered the suit to stand revived, unless cause to the contrary should be shown in ten days.

UNITED STATES, for the use of Walter Warder, v. F. X. KENEDY, Administrator of W. L. Kenedy.

No creditor can maintain an action against the administrator of his debtor, upon his administration-bond, before a *non est* returned upon a *capias ad respondendum* against the administrator, or a *fi. fa.* returned *nulla bona*, or other apparent insolvency. The Maryland Act of 1720, c. 24, § 2, is in force in the county of Washington.

DEBT, on administration-bond. Breach assigned in not paying a debt due by the intestate to Walter Warder, ascertained by arbitrators mutually chosen by the said Walter Warder and the defendant as administrator ; and in not making an inventory of

the estate of his intestate; and in not rendering any account thereof, as required by law.

By the Maryland law of 1720, c. 24, § 2, it is enacted, "That it shall not be lawful for any creditor to prosecute any administration or testamentary bond, for any debt or damage due from or recovered against any deceased person's effects, before a *non est inventus* on a *capias ad respondendum* be returned against the executor or administrator; or a *fieri facias* returned *nulla bona* by the sheriff; or such other apparent insolvency or insufficiency of the person or effects of such executor," &c., "as shall, in the judgment of the Provincial Court, render such creditor remediless by any other means than suing the bond, on penalty of being condemned in full costs; and the defendants may give this act," &c., "in evidence without special pleading."

Upon a general demurrer to the declaration it was objected, by *Mr. Redin*, for the defendant, that there was no averment in the declaration that a *non est inventus* had been returned against the defendant, who was a resident of this county; nor a *fieri facias* returned *nulla bona*; or any other apparent insolvency or insufficiency of the defendant, as required by the Maryland statute of October, 1720, c. 24, § 2.

Mr. W. L. Brent, *contrà*, — that the Act of 1720, c. 24, was repealed by the Act of 1798, c. 101, § 2, the former being inconsistent with the provisions of the latter act, contained in sub-chapters 5, § 5; c. 6, § 13; c. 8, §§ 9 and 14; c. 10, §§ 4 and 9, and c. 12, § 5.

Mr. Redin, in reply, contended that there was no inconsistency in the provisions of the two acts.

The COURT, being of that opinion, and that the Act of 1720 still remained in force, rendered judgment upon the demurrer for the defendant, (*nem. con.*)

UNITED STATES, for the use of Keirle *et al.* v. H. SHAW, Administrator of John Shaw.

An action may be maintained upon an administration-bond, by a creditor of the intestate, after a return of *non est* upon a *capias ad respondendum* against the administrator, although thirteen months have not elapsed since the granting of the letters of administration. The Maryland Act of 1720, c. 24, is still in force in the county of Washington, D. C.

DEBT, on administration-bond. Breach assigned in not paying a note due by the intestate to Keirle & Son, and averring a previous return of *non est inventus* upon a *capias ad respondendum*

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against the defendant, in this county, in which he resided. General demurrer.

Mr. W. L. Brent, for the defendant, contended that the Maryland Act of 1720, c. 24, was repealed by the inconsistent provisions of the Act of 1798, c. 101, (as stated in the preceding case against Kenedy's Administrator,) and that no suit could be brought upon the bond before the expiration of thirteen months after administration granted, except in the particular cases specified in the Act of 1798.

Mr. C. Cox, for the plaintiff, *contra*, to show that the Act of 1720, was still in force notwithstanding the Act of 1798, and that a return of *non est* is sufficient to justify a suit on the administration-bond, cited *Dorsey's case*, 4 Gill & Johns. 471, and the case of *Laler's Administrator*, 2 Harris & Gill, 277, 389.

The COURT, being of opinion, as in the preceding case, that the Act of 1720, was not repealed by the Act of 1798, and that an action may be brought against the administrator within the thirteen months allowed by the 14th section of the 8th sub-chapter, overruled the demurrer and rendered judgment for the plaintiff, (*nem. con.*)



STEWART'S ADMINISTRATRIX v. CALLAGHAN & others.

The commissions of a supercargo of a sequestered cargo are a charge upon the proceeds of sales, and are not included in the indemnity to be granted by the sequestering government.

The indemnity stands in the place of the proceeds of sale, and the commissions are a charge upon that indemnity.

THIS was a bill to enjoin the amount of the supercargo's commissions upon a voyage of the brig *Ruth* and *Mary*, out of the sum awarded by the commissioners under the treaty of indemnity with the king of the Two Sicilies, and to prevent the same from being paid out of the treasury of the United States to *Mr. Callaghan*, assignee of *Coulter*, the insolvent owner of the brig and cargo.

The answer having been filed, a motion was made to dissolve the injunction which had been granted by one of the judges in vacation.

The plaintiff relied upon an agreement, under seal, between *Callaghan* and *Hall*, the assignees of *Coulter*, and her intestate; by which, in consideration of services rendered by him, (*Alexander Stewart, Jr.*) they agreed "that out of the recovery then in prosecution before the commissioners," &c., "whatever may be

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the amount thereof, the said Alexander Stewart, Jr. shall be allowed the full amount of his commission charged in the statement of the said claim, to wit, \$5,307.50, together with interest on the same, if interest shall be allowed on the claim by the commissioners; and so much of any award that may be made by said commissioners, on the said claim, is hereby assigned to the said Alexander Stewart, Jr.," and they constitute him, irrevocably, their attorney to receive the sum of \$5,307.50, with interest, if it should be allowed on the claim by the commissioners.

The award was for \$71,411, but did not include the claim for the supercargo's commissions.

The defendants, in their answer, contended that, as the commissioners rejected the claim for the commissions, the plaintiff's intestate was not entitled to them, under the agreement.

But the COURT (*nem. con.*) was of opinion, that as the commissions of the supercargo would have been a charge upon the proceeds of the sales of the cargo, if it had arrived at the place of its destination, they are to be considered as a charge upon the fund, which stands in the place of those proceeds of sales, and were not a proper charge against the king of the Two Sicilies, under the treaty of indemnity, and that the plaintiff is entitled to the same, under the agreement, both at law and in equity.

The injunction was ordered to stand until final hearing.

BALTIMORE AND OHIO RAILROAD COMPANY v. JOHN P. VAN NESS,
and others.

The time, to extend and construct the Baltimore and Ohio Railroad into and within the District of Columbia, given by the Act of Congress of March 2, 1831, c. 84, was extended by the Act of February 26, 1834, c. 11, to another period of four years.

The Act of March 3d, 1835, c. 38, is not void because its title misrecites the date of the act to which it is supplementary; nor is it confined to the mere construction of the road; but gives authority also to condemn land for the use of the company; nor is it void because its title purports it to be an act supplementary to an act which expired by its own limitation; it being revived by a subsequent act.

If the Act of 1831 expired by the limitation contained in its 5th section, it was revived by the Act of February 26, 1834.

It is not necessary that the jury should be sworn on the lot to be condemned.

It is sufficient that they meet on the lot.

They may be sworn on another lot.

Notice, on the 27th of April, that the jury would meet on the land, on the 1st of May, to take the inquisition, is sufficient.

The railroad is a road for public use, and land may be taken therefor, upon just compensation being made.

SEVERAL inquisitions were taken, upon several warrants issued by a justice of the peace for the county of Washington, against

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D. Carroll, John A. Wilson, D. A. Hall, and Moses Tabbs and others, under the Act of Congress of March 3, 1835, c. 38, [4 Stat. at Large, 757,] entitled, "an act supplementary to an act entitled 'an act to authorize the extension, construction, and use of a lateral branch of the Baltimore and Ohio Railroad into and within the District of Columbia,' passed December, 1829."

The act alluded to was not passed in December, 1829, but on the 2d of March, 1831, c. 84.

These inquisitions being returned to the clerk's office by the marshal,

Mr. R. S. Coxe, for the defendants, moved the Court to set them aside for the following reasons :

1. Because there is no authority given by any act of the Congress of the United States to warrant the said proceedings.

2. Because the said proceedings are wholly irregular and unauthorized by any law.

3. Because the jury did not estimate the comparative advantages and disadvantages of the contemplated railroad ; but, in estimating the same, proceeded upon unfair and unequal principles.

4. Because the jury heard illegal evidence.

5. Because there was no lawful oath administered to the witnesses.

6. Because there has been no proper or lawful return of the said proceedings.

7. Because there was no legal or sufficient notice to the owners of the property through which the said road is laid.

Mr. Coxe contended that the Act of March 3d, 1835, was void, because its title referred to an act passed in December, 1829, when no such act existed ; and that if it was not void, still it did not give any right to condemn land for the road ; it only gives authority to locate and construct the road ; but these powers do not imply a power to condemn the land. It refers to the Act of 1831, which had expired by its own limitation, because the road was not commenced within a year after passing the act. If it was revived by the Act of February 26, 1834, c. 11, the Act of 1835 should have been supplementary to the Act of 1834, and not to the expired Act of 1831.

He contended, also, that the jury should have been sworn on the land, whereas the jury were sworn in all the cases, upon the land of *Mr. Wilson* only. That the Act of 1831 only provides for the mode of proceedings by the marshal and jury ; not as to any ulterior proceedings, or the return, or the jurisdiction of this Court.

Mr. J. Dunlop, contra. The Acts of 1831, 1834, and 1835, give the power to condemn the land, and refer to the Maryland

charter of 1827, which requires the inquisition to be returned to the clerk, by whom it is to be filed in court, and it is to be affirmed, unless set aside by the Court; and if set aside, a new inquisition is to be taken. There can be no doubt of the jurisdiction of the Court.

The notices were all served on or before the 27th of April, and the jury was summoned for the 1st of May. There is no irregularity in the proceedings. There is no evidence that the jury estimated the comparative advantages and disadvantages; or that they proceeded upon unfair or unequal principles; nor that they received illegal evidence; nor in what manner the jurors were sworn. No error is shown in the return of the inquisitions.

Mr. Coxe, in reply, contended that the railroad is not a common highway. It is the exclusive right of the railroad company; and private property cannot be taken for private use. If it be doubtful whether Congress has authorized the taking of private property, the Court would so construe their act as not to violate the Constitution.

CRANCH, C. J., delivered the opinion of the Court.

The Act of Congress of the 3d of March, 1835, c. 28, [4 Stat. at Large, 757,] entitled an act supplementary to an act entitled "An Act to authorize the extension, construction, and use of a lateral branch of the Baltimore and Ohio Railroad into and within the District of Columbia," passed December, 1829, § 3, authorizes the railroad company to construct their road through or over the lots or squares in the inquisitions mentioned, "upon the same terms, and with the same privileges as are prescribed for passing through the squares enumerated in the first section of the act;" that is, in the same manner and with the same rights and privileges which are granted to them by the Act" (of the 2d of March, 1831,) "for the construction of their said road within the District of Columbia beyond the limits of the city of Washington, any thing in the said act notwithstanding."

By the first section of that act (March 2, 1831) the railroad company are authorized to exercise the same rights, powers, and privileges, and be subject to the same restrictions in the extension and construction of this road, as they may exercise, or are subject to, under and by virtue of their charter of February 28, 1827, in the extension and construction of any railroad in Maryland, and are entitled to the same rights, &c., provided that before they proceed to construct any railroad on any land, &c. they shall first obtain the assent of the owner, &c.; but if they cannot obtain such assent, they may apply to a justice of the peace of the county of Washington, who shall issue his warrant to the marshal to summon a jury of twenty inhabitants of the district, not interested, &c.

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“to meet on the land,” on a day, not less than three nor more than fifteen days after issuing the warrant, to proceed to value the damages which the owner or owners of any such land will sustain by the use or occupation of the same required by the said company; and the proceedings, duty, and authority of the said marshal, in regard to such warrant and jury, and the oath or affirmation to be administered, and inquisition to be made and returned, shall be the same as are directed and authorized, in regard to the sheriff, by the fifteenth section of the Act of Assembly of the State of Maryland incorporating the said Baltimore and Ohio Railroad Company; and all the other proceedings in regard to such jury, and the estimating and valuation of damages, and the payment, or tender of payment of any damages ascertained by such valuation, and effect thereof, and of the view of any lands or other property or materials, as to giving the said company a right to use the same for the use or construction of any railroad within the said district as hereby authorized, shall in every case, and in every respect, be the same as is provided in and by the above-mentioned act of incorporation, in regard to the railroad thereby authorized to be constructed by the said company.”

But, by this Act of March 2, 1831, the railroad company were forbidden to cross any private property in the city of Washington, even with the consent of the owner. This prohibition was the cause of the Act of March 3, 1835.

By the fifteenth section of the Act of Maryland of February 28, 1827, each party is to strike out four of the twenty jurors, and the remaining twelve are to act as the jury of inquest, and the sheriff is to administer an oath to each juror that he “will justly and impartially value the damages which the owner or owners will sustain by the use or occupation of the same required by the said company;” and the jury, in estimating such damages, shall take into the estimate the benefit resulting to the said owner or owners, from conducting such railroad through, along, or near to the property of such owner or owners; but only in extinguishment of the claim for damages; and the jury shall reduce their inquisition to writing, and shall sign and seal the same; and it shall then be returned by the said sheriff to the clerk, or prothonotary of his county, as the case may be; and, by such clerk or prothonotary, filed in his court, and shall be confirmed by said court, at its next session, if no sufficient cause to the contrary, be shown; and, when confirmed, shall be recorded by said clerk or prothonotary, at the expense of said company; but if set aside the court may direct another inquisition to be taken in the manner above prescribed; and such inquisition shall describe the property taken, or the bounds of the lands condemned, and the quantity or duration of

the interest in the same, valued for the company; and such valuation, when paid, or tendered to the owner or owners of the said property, &c., shall entitle the company to the estate and interest in the same thus valued, as fully as if it had been conveyed by the owner or owners of the same, &c.

Upon consideration of the proceedings in these cases, and the several acts aforesaid, the COURT is of opinion,

1. That the said proceedings are warranted by law.
2. That they are regular.
3. That it does not appear that the jury did not consider the benefits as well as the disadvantages.
4. That it does not appear that illegal evidence was received.
5. Nor that the witnesses were not properly sworn.
6. That the return of the marshal is correct in form.
7. The notice was sufficient.

Another objection, suggested in the argument, was, that it is taking private property for private use, which is not authorized by the Constitution.

The fifth amendment of the Constitution of the United States says, that private property shall not be taken for public use without just compensation.

But the objection is that private property is taken for private use, with just compensation; which is not within the prohibition of the Constitution; although it would be an arbitrary proceeding.

But this railroad, although it may be profitable to the stockholders, is also a great public benefit. It does not prevent the public from enjoying all the advantages which they enjoyed before, and gives them a cheaper, safer, and more expeditious mode of travelling than they would otherwise have. If it may not be called a common highway, yet it is really a common good. It is a great public convenience. The land is really taken for public use.

The condemnation of land, for such purposes, has been so general, and so extensive, for many years, that it may well be considered as established by the law of the land. Every State of the Union has granted charters for such objects, with similar powers.

The rates of toll, &c. are established by law, which could not be done unless the object was of a public nature; nor would the legislature have power to restrain them in the exercise of their private rights.

The State of Maryland also has a great interest in the road, as it is to receive five per cent. upon the gross receipts of tolls from passengers; and has an option to take a large portion of the stock within a limited time after the completion of the road. The con-

demnation of the land, therefore, is clearly for the Maryland public use; even if it be not for the use of the whole American public.

If the constitutionality of a law be doubtful the Court is not at liberty to declare it void; but is bound to give it effect. In *Fletcher v. Peck*, 6 Cranch, 87, Mr. Chief Justice Marshall, in delivering the opinion of the court, said,

"The question whether a law be void for its repugnancy to the Constitution, is, at all times, a question of much delicacy, which ought, seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled, by duty, to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

Again, he said: "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?"

In the case of *Horne's Lessee v. Dorrance*, 3 Dall. 304, 312, the Circuit Court of the United States, for the district of Pennsylvania, admit, that, in a case of necessity, of which the legislature is the sole judge, it may take the real estate from A. and give it to B., on making compensation, to be ascertained by a jury, although the Constitution of Pennsylvania expressly declares that the right of acquiring, possessing, and protecting property is natural, inherent, and unalienable.

So that, whether the railroad is a public or a private object, in itself, the legislature, having deemed it to be so far a public object as to be worthy of their control and regulation, and of the exercise of their power to apply private property to its use, upon making just compensation, to be ascertained by a jury, we cannot say that the provisions of the act, which authorize the condemnation of land, for such a road, are void, as being unconstitutional, or as contravening any of the principles of natural justice.

The inquiries were all confirmed, (MORSELL, J., doubting as to the last point.)

UNITED STATES v. PEACO *et al.*

To constitute a riot, it is not necessary that the violence and tumult actually committed should have been premeditated by three or more persons assembled with intent to commit the same; nor that there should have been promises of mutual assistance, before or at the time of committing the actual violence.

To charge a man with riot, who is seen in the crowd, after the commencement of the affray, it is not necessary to show that he was actively engaged in the affray, or actively countenancing or supporting the same, if present and ready to give his support when necessary.

A person convicted of assault and battery committed in a riot, may still be tried and convicted of the riot.

To constitute a riot, three or more persons must assemble, and either at the time of assembling, or afterwards, while assembled, intend, with force and violence, to do some unlawful act, and mutually to assist each other against any who should oppose them in doing such act; and the act must be done in a violent and turbulent manner, to the terror of the people.

It is no good ground of arrest of judgment, in a criminal case, that the marshal did not summon forty-eight jurors, and the clerk draw twenty-three grand jurors, by ballot, according to the Maryland Act of 1797, c. 87, which was only applicable to the county courts; nor that one of the petit jurors had been summoned and had served on the petit jury of the next preceding term; such objections are too late, after the jurors are sworn.

INDICTMENT for a riot, which originated in a quarrel between the members of the Typographical Society and some journeymen printers in the employment of General Duff Green, and which was immediately provoked by an attack made by Harvey, one of those journeymen, upon Lowry, the secretary of a meeting of the society, in which General Green's men were designated as rats, (which means, unworthy members of the profession;) a revised list of rats having been, on that day, published.

After the evidence was closed on both sides, *Mr. W. L. Brent*, for the defendants, having cited 1 Russell on Crimes, 247, 249, 2 Chitty, Cr. Law, 487, and 1 Starkie, 524, prayed the Court to instruct the jury,

"1st. That to constitute a riot, the violence and tumult must not only be premeditated, but the premeditation must be by three or four persons assembling, or already assembled together, with the intention to commit an act, and afterwards committing the same in a violent, turbulent manner, to the terror of the people.

"2d. That should the jury be of opinion, from the evidence, that the disturbance, on the night of the 30th of May, spoken of by the witnesses, was not premeditated, and arose upon a sudden quarrel or cause, produced by the previous attack on Lowry, and without promises of mutual assistance, before, or at the time, the defendants are not guilty of a riot.

"3d. That, should the jury be of opinion, from the evidence, that the defendants did engage in the affray, after they had assembled to assist Lowry, who had been beaten, they are not

guilty of a riot, unless it has been proven, by satisfactory evidence, that, before their engaging therein, or at the time thereof, they formed themselves into a party of three or more, and made mutual promises to assist one another.

"4th. That, should the jury be of opinion, from the evidence, that the defendants were seen in the crowd, after the affray began, they are not guilty of a riot, unless it be satisfactorily proven that they were actively engaged in doing, countenancing, or supporting the same, or ready, if necessary, to support the same.

"5th. That, in the present case, should the jury be of opinion, from the evidence, that the only proof of Walter's being in the affray, is from his having assaulted Madden, he is entitled to a verdict of acquittal, because he has been tried and found guilty of the said assault, and cannot be again tried and punished for the same."

Which instructions the COURT refused to give, but instructed the jury, that, before they can lawfully convict the defendants, upon this indictment, they must be satisfied, by the evidence, that the defendants, to the number of three or more, assembled; and, either at the time of assembling, or afterwards, while assembled, formed an intent, with force and violence, to do the acts charged in the indictment, or some of them, and mutually to assist each other against any who should oppose them in doing such acts; and that the defendants did the same in a violent and turbulent manner, to the terror of the people.

That it is not material how suddenly that intent was formed, nor whether it was produced by the previous contest between Lowry and Harvey.

Nor is it necessary, to the conviction of the defendants, on this indictment, that they should have actually made formal promises to each other, of mutual assistance, if they had such a mutual intent.

Nor is it necessary to their conviction, that those who were assembled, with intent to commit the acts charged in the indictment, should have been actively engaged therein, if they were present, and ready to support, if necessary.

The COURT refused to give the fifth instruction prayed by the defendant's counsel, because, although the assault on Madden should be the only evidence of his being concerned in the riot (if it was one) and although he should have been punished for that assault, yet if he was one of the rioters, he is jointly guilty with all the rest of the defendants, of all the other outrages committed by them in that riot; and the punishment for the assault will be considered (if he should be found guilty of the riot,) when the

United States v. Cross.

Court is about to apportion the punishment of the defendants according to their several degrees of guilt.

Although an assault may be given in evidence upon a prosecution for a riot, yet it is not the only evidence necessary to support it. The true criterion of identity of cause of action, or of prosecution, is, that the same evidence will support both; the offences are quite distinct and different. An assault is not necessary to constitute a riot; nor are the ingredients of a riot necessary to constitute an assault. 2 Hawk. c. 35; 1 Chitty, C. L. 452.

After a verdict against the defendants, their counsel moved in arrest of judgment, because forty-eight jurors were not summoned by the marshal, and twenty-three grand jurors drawn, by ballot, by the clerk, according to the provisions of the Maryland Act of 1797, c. 87, § 8; and because one of the petit jurors who sat upon the trial, had been summoned and served as a petit juror at the next preceding term, contrary to the 3d section of the same act.

The COURT, however, overruled the motion, being of opinion that the eighth section of the Act of 1797, c. 87, applied only to the County Court of Maryland; as this Court had decided at the very commencement of its practice, when the following order was entered upon its minutes. "Friday, July 10, 1801. Ordered, by the Court, that twenty-four grand jurors, and thirty-six petit jurors be summoned to the next term;" and such has been the practice ever since that time.

In Burr's Trial, p. 37, it is said that any one, under a criminal charge, may, before the grand jury is sworn, except to an irregularity in summoning them; from which an inference is drawn, that after they are sworn the exception is too late.

The third section of the Act of 1797, c. 87, "that no person shall be summoned as a juror, by any sheriff or coroner of this State, to two general, or county courts successively," is for the ease of jurors, and merely directory to the summoning officer. It constitutes no valid exception to the qualification of the juror; and if it did, it is too late to take it after the juror is sworn.

Motion overruled; and judgment upon the verdict.

 UNITED STATES v. GEORGE CROSS.

It is an indictable offence to cruelly beat the slave of another, in the public highway and leave her there, exposed to public view.

THE first count of the indictment was for a common assault and battery on "one negro Milly."

The second count charged the defendant with an assault upon

United States v. Bowen.

one negro Milly, "in a public road and highway in the county aforesaid," and cruelly beating her, "to the great damage of the said Milly and to the terror and disturbance and annoyance of the good citizens of the United States then and there passing and re-passing on and near the said public road and highway, and there and thereabouts living and abiding, and against the peace and government of the United States."

It appeared in evidence that Milly was the slave of Mr. Z. Walker; and at the prayer of the Attorney of the United States,

The COURT instructed the jury that if they should be of opinion, from the evidence, that the defendant cruelly beat the slave in the public highway, and left her there, exposed to public view, it was an indictable offence.

THRUSTON, J., however, was of opinion that it was not an indictable offence unless the beating was in the public view.

 UNITED STATES v. JOHN ARTHUR BOWEN.

If a slave in Washington, D. C., enters the sleeping-room of his mistress in the night time with an axe in his hand, with intent to kill her, she being then in bed in the room, and is prevented, by the waking and noise of the mistress and her servant, and by being seized and forced out of the room, he is guilty of an attempt to murder a person under the Maryland Act of Assembly, 1751, c. 14, § 2. Drunkenness is no justification; but may be given in evidence to enable the jury to judge of the intent.

If a slave, lodging in the house, lifts the latch of his mistress's sleeping-room in the night time, and enters with an axe in his hand, and with intent to murder her, he is guilty of burglary; and, to constitute an attempt to murder, no further act of violence is necessary.

INDICTMENT of a slave for an attempt to murder his mistress; and for burglary.

The defendant was the slave of Mrs. Anna Maria Thornton.

The indictment contained three counts.

The first was under the Maryland law of 1751, c. 14, § 2, which enacts that "slaves, convicted of attempting to murder any person, shall suffer death without benefit of clergy;" and charged the prisoner with an attempt to murder his mistress, Mrs. Thornton, without stating the means, or manner, of the attempt.

The second charged the attempt to be with an axe.

The third, was for burglary in breaking the dwelling-house of Mrs. Thornton in the night time, with intent to murder her.

Mr. Jones, for the prisoner, insisted that the first count was too general; as it charges the simple attempt to murder, without saying by what means, or in what manner.

What is an attempt? An unexecuted intent is not punishable

by human laws. There must be some overt act testifying the intent, and amounting to an attempt. The having a weapon is not sufficient. If I have a pistol and do not present it, it is no attempt to kill. If the prisoner had raised the axe in a violent and threatening manner, within striking distance, and had only been prevented by the interposition of some superior force, it would have been an attempt.

As to the third count. There was no burglary. The prisoner was lawfully in the house; and the raising the latch of an inner door, is not such a breaking as is necessary to constitute burglary.

Mr. Key, United States Attorney, *contrà*, admits there must be an intent and an attempt to murder; but it is not necessary that he should raise the axe. It is sufficient that he took the axe and went into the chamber with intent to murder his mistress. It is an attempt; and drunkenness is no excuse; perhaps an aggravation. 3 Chitty, C. L. 1107; 1 Hale, H. P. C. 554; *Edmonds's case*, Hutton, 20; Kelyng's Rep. 67; 3 Inst. 5, where a servant lodging in the same house, unlatched the door of his master's bedroom with intent to kill him, was hanged for the burglary.

Mr. Key, then prayed the jury,

1. "That if they believe from the evidence that the prisoner took the axe, and entered with it into his mistress's room, with the intent to murder her, and was prevented by the awakening of his mistress and her servant, and by their noise, and his being seized and forced out of the room, from executing his intention, then the prisoner is guilty under the Act of Assembly.

2. "That if the jury believe from the evidence that the prisoner was drunk when he formed and attempted to execute the above intention, it does not excuse the prisoner."

Which instructions the Court gave, but added, (*THRUSTON, J., contrà*,) that the intoxication of the prisoner is a fact proper to be considered by the jury in forming their opinion of the intent with which he took the axe and entered his mistress's chamber.

The Court also, at the prayer of the United States Attorney, instructed the jury, that if they believe from the evidence, that the prisoner, in the night time, unlatched his mistress's door, and with an axe, entered the room with intent to kill her, then he is guilty under the third count of the indictment.

Whereupon, *Mr. Jones*, for the prisoner, prayed the Court to instruct the jury as follows:

1st. "But if the jury find that the prisoner did, in fact, nothing more, in execution, or towards the execution of his supposed felonious intent, than to enter the room with the axe in his hand; and that after he came into the room he made no motion or attempt whatever to raise the axe against his mistress, or to strike

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at her, and proceeded no further than merely to enter with such intent, then it is not an attempt to murder, within the meaning of the Act of Assembly, although expelled from the room immediately.

2d. "But the intoxication and consequent mental excitement and derangement of the prisoner, is proper to be considered by the jury, as accounting for his misconduct, and inferring the absence of a malicious and felonious intent;" which two instructions the Court refused to give.

The prisoner was convicted, and on the 23d of January, 1836, sentenced to be hanged on the 26th of February; but he was reprieved from time to time and finally pardoned at the instance of his mistress.

UNITED STATES v. RICHARD DAVIS.

A mulatto born of a white woman, and not in a state of servitude by law, is a competent witness for a white man.

THE defendant was indicted for an assault and battery with intent to kill one Shorter, a colored man.

Upon the trial a mulatto man named Collins, born of a white woman, and not in a state of servitude by law, was admitted by the Court to testify for the defendant, who was a white man.

See the Act of Maryland, 1717, c. 13, § 2.

UNITED STATES v. RICHARD BARRY.

An indictment under the Penitentiary Act of the District of Columbia, for stealing a bank-note, must state the amount, as well as value of the note. "One hundred silver coins of the value of seventy-five dollars," is a sufficient description of the money stolen.

THE prisoner was convicted under the 9th section of the Penitentiary Act of March 2, 1831, of stealing "one bank-note of the value of twenty dollars; and one hundred silver coins of the value of seventy-five dollars."

By that section of the act, it is enacted, "that every person convicted of feloniously stealing, taking, and carrying away any goods or chattels, or other personal property of the value of five dollars or upwards; or any bank-note, promissory note, or any other instrument of writing for the payment or delivery of money,

or other valuable thing, to the amount of five dollars or upwards, shall be sentenced to suffer imprisonment and labor," &c.

Mr. Hoban, for the prisoner, moved in arrest of judgment ;

1. That although the value of the bank-note is averred in the indictment, yet the amount of money thereby promised is not. It must appear to be a note for the payment of five dollars or upwards, in order to justify a sentence to the penitentiary.

2. That the expression "silver coins," is of too general import to support an indictment.

Mr. Hoban cited *Rex v. Craven*, 2 East, Cr. L. 601 ; *Rex v. Milnes*, 2 East, Cr. L. 602 ; *Stewart's case*, 4 Serg. & Rawle, 194.

Mr. Key, *contrà*, cited 3 Chitty, Cr. L. 947, 973, 974, a ; 2 East, P. Cr. 497 ; 1 Chitty, 235, 236, 237 ; *Hedges's case*, 1 Leach, C. C. 52 ; *Grimes's case*, 2 E. P. C. 646.

The COURT (*nem. con.*) was of opinion that the amount as well as value of the note ought to have been averred ; but that the description, "one hundred silver coins of the value of seventy-five dollars," was sufficiently certain, and therefore refused to arrest the judgment.

The prisoner was sentenced to the penitentiary for three years.

UNITED STATES v. JOHN BROWN, a Mulatto.

Serving out the term of imprisonment in the penitentiary for felony, does not restore the party to his competency as a witness.

INDICTMENT for highway robbery of George Milburne.

The Attorney for the United States offered to examine, as a witness for the United States, one Sandy Spriggs, a free mulatto who had been convicted of larceny, and suffered his term of imprisonment and labor in the penitentiary of this district.

The prisoner's counsel objected that the witness was incompetent because convicted of an infamous offence.

The Attorney for the United States, contended that the suffering of his punishment restored his competency ; like burning in the hand, and transportation which is a substitute for the burning, and which by the statute of 19 Geo. 3, and 4 Geo. 1, c. 11, is to have the same effect. He also cited 4 Stark. on Ev. 717 ; 1 Chitty, 601, 602, and 2 Russell, 594, 595.

The COURT however, (THRUSTON, J., dissenting,) sustained the objection and rejected the witness ; being of opinion that the execution of the sentence, without any provision by statute to that effect, did not restore his competency.

The prisoner was acquitted.

United States v. Henning.

The witness, Sandy Spriggs, was afterwards convicted of the same robbery, and sentenced to the penitentiary for four years only; he having probably prevented the other robbers from killing Milburne.

(See also the Maryland Act of 1793, c. 57, § 15, by which the service and labor, imposed as a punishment under that act, have the effect of a pardon; from which special enactment it is to be inferred that without it, the punishment would not operate as a pardon.)

UNITED STATES v. WASHINGTON HENNING.

Quære? Whether it is an indictable misdemeanor to attempt to commit an offence, which, if carried into execution, would not go to corrupt the fountains of justice, of legislation, or the executive administration of the law; or involve actual violation or breach of the peace.

It makes no difference whether the attempted offence be at common law, or created by statute.

To attempt to sell a free mulatto as a slave for life, is not an indictable offence in the District of Columbia.

THE defendant, Washington Henning, *alias* Haney Hedley, was convicted upon an indictment for attempting to sell a free mulatto boy as a slave for life, contrary to the fifteenth and sixteenth sections of the Maryland Act of 1796, c. 67.

The indictment contained three counts, each concluding against the form of the statute.

The first count charged that the defendant unlawfully and fraudulently attempted to carry out of this county and district, forcibly and fraudulently, a free mulatto boy named Thad Key, knowing him to be free.

The second count charged that the defendant brought into this county a certain free mulatto boy, under the age of twenty-one years, named Thad Key, bound to service until he was twenty-one years of age, and fraudulently and illegally attempted to sell him as a slave for life to Washington Roby and George Gray, the defendant knowing him to be entitled to freedom at twenty-one years of age.

The third count charged that the defendant brought the free boy into this county and attempted to sell him as a slave for life to the said Washington Roby and George Gray, the defendant then knowing the boy to be free.

Mr. W. L. Brent, for the defendant, moved in arrest of judgment, and contended that there was no indictable offence charged in the indictment; that the statute does not punish the attempt to commit the offence therein mentioned; and that it is not a mis-

demeanor at common law to attempt to commit an offence created by statute. He cited 1 Russell on Crimes, 44, 47; *Rex v. Cartwright*, Russell & Ri. 106, E. Term, 1806; and 3 Chitty, 994, 1140, 1141, 1142.

Mr. Key, United States District Attorney, *contrà*, cited 3 Chitty, 1131, 1190, (b), 683, 696, 699, and note; *The King v. Higgins*, 2 East's Rep. 5, 6, 7, 11, 18, 19, 21; *The King v. Phillips*, 6 East, 464; 1 Russell on Crimes, 46. It is an indictable offence to attempt to do an act prohibited by statute, as much as it is to do an act prohibited by the common law.

But the act of selling a free mulatto as a slave is an offence at common law; it is a cheat by false tokens.

The possession and color of the boy are tokens corroborating the assertion of title. Common prudence could not guard against the deceit.

The COURT (CRANCH, C. J., *contrà*.) arrested the judgment.

MORSELL, J., was of opinion that an attempt to commit an offence, created by statute, which was not an offence at common law, is not indictable.

THRUSTON, J. The following remarks are rather an answer to the point made and attempted to be sustained by the Attorney for the United States, than an opinion on the indictment itself. I came into court after the indictment was read, and did not hear it; but the two positions stated at the head of the following opinion, were taken by *Mr. Key*, and as they involved considerations of great importance, I wrote, (with little time for deliberation, and without the means of consulting books,) the suggestions which are stated below.

The *United States v. Haney Hedley*, (otherwise Washington Henning.) Indictment at common law, for attempting or offering to sell a free colored boy as a slave.

The Attorney for the United States endeavored to support this indictment, on a motion to arrest the judgment by the traverser's counsel, on two grounds.

1. That every attempt or offer to commit any crime or misdemeanor at common law, or by statute, is an indictable offence.

2. That the act itself was, *per se*, an indictable offence, because it amounted to a common-law cheat or fraud.

As to the first position: Its universality, if carried out, would lead to great absurdities, such as neither the law nor common sense can tolerate, and, therefore, I cannot agree to it; but am of opinion that there is a rational limit to it, beyond which we ought not to go; and this limit is well defined by certain rules and principles, which, if attended to, will direct us into the path to be pursued; this limit embraces only those attempts, or offers, to

violate laws which, if the attempt be carried into effect, would invade the very safeguards of social order, or lead to the utter subversion or corruption of our political institutions; among the most considerable of those violations, perhaps, we may class mere breaches of the peace. I mean actual breaches of the peace. Such is the tenderness of the law, from the earliest legal records, and its sensibility to any thing like breaches of the peace, that it has been cherished with uncommon solicitude, as far back as the history of our institutions goes; so that it is kept alive, and is universally inserted, or ingrafted, in every indictment, even where it would require great ingenuity to discover where the force and arms could be found in the setting out of the offence. Therefore, if this peace, this great and long-nourished panoply of our social happiness, be not only assailed, but attempted to be, by any overt acts, it may be, probably, an indictable offence. So attempts to bribe a judge, or a member of Congress, or an executive officer, to betray his duty and trust, might lead, if carried into effect, to the utter corruption of the fountain of justice, of legislation, and of the due administration of the laws; and, therefore, the danger attending such an act, its ruinous consequences to society, are of such vital importance, that an attempt, even, to perpetrate such a crime, may reasonably afford just ground for an indictment; so of murder, robbery, arson, and, in short, every offence (to say nothing of their enormity) where the perpetration must necessarily be attended with a breach of the peace. I will not say that an attempt to commit some other offences denominated *mala in se*, might not be indictable; but I will take the converse of the rule, and boldly say, that there are infinite acts of moral fraud, of *mala in se*, which are not indictable, but remediable only by civil process. For my present argument, and as at present advised, I will take my stand on this tangible, visible, well-defined ground, that an attempt to commit any crime or misdemeanor, which, if carried into effect, would involve a breach of the peace, may be indictable. I mean an actual, not a mere technical breach of the peace; therefore the actual selling an unsound horse, or merchandise, under false representations, or any other private fraud, are not indictable offences; why? they are unattended with a breach of the peace, are to no public detriment, and, therefore, to be redressed *civiliter* only. But these are *mala in se*, and morally criminal. But it occurs to me that there are cases where the rule that I have laid down would find an exception, namely, "that an attempt to commit a crime, which if carried into effect must necessarily involve a breach of the peace, might be indictable." To constitute a breach of the peace, there can be only two things necessary; either an actual battery, or an assault. Now we see

every day indictments for both ; but I have never read of, heard of, or known an indictment for an attempt to commit an assault. Suppose a man were to threaten another that he would beat him, and make demonstrations to that effect, and is held back by others, so as to prevent an assault even, would this be indictable ? If so, out of the million of cases of assault and battery in the books, and in this Court, we should have heard of, read of, or actually witnessed such a prosecution. These considerations are applicable so far to common-law offences only. Next, as to an attempt, or offer, to violate a penal statute.

I endeavored to show to what absurdities this position would lead, if carried to the fullest extent. Instanced the case of attempting to sell a gill of whiskey without license ; who can imagine such an attempt only, not carried into effect, would be indictable ? So in a multitude of parallel cases. There are laws to prevent the hunting of deer, or fishing at certain seasons. Suppose a man proposes to another, to go to hunt or fish in such seasons, and actually provides arms or nets, and they go part of the way and turn back, would this be indictable ? My reason and common sense forbid an affirmative reply.

The first position, then, of the Attorney of the United States, does not amount to a universal rule ; it is too broad. Show me an universal rule of law, holding in all possible cases, and you will show me a phenomenon that my Lord Coke never dreamed of. I cannot see any distinction between an attempt to violate a penal statute, or to commit a common-law offence ; if there be any, my reason is too obtuse to discover it. I cannot discern what gives this dignity to a statutory penalty, or prohibition, which cannot be equally claimed by the good old common law. In fact, there is no difference ; and the line of demarcation which I have drawn as to common-law offences, ought to be the fixed boundary between punishable and dispunishable attempts to violate penal statutes. Without repeating the class of cases which are indictable, and those which are not, I refer to the numerous specifications of those cases which I have set out in my consideration of them under the common law. The indictment before us, was for a fraud in attempting to sell a free negro as a slave, contrary to the provisions of the penitentiary law. The argument first started on the broad ground, that an attempt to violate any penal statute was an indictable offence ; this, I think, I have answered sufficiently ; such a broad assumption cannot be sustained.

Secondly, it was urged that the attempt to sell a free man for a slave, was a fraud at common law, and therefore indictable ; but the multitude of cases, never yet contradicted, that a mere over-

reaching, or misrepresentation, in a private sale, is not an offence at common law, seems to me to furnish a clear refutation of this argument. It was then contended in the case in question, that false tokens were used, or false pretences. I heard of none, of nothing more than false representations, or assertions that the negro was free; it was precisely like all those offences, which, though morally wrong, were left entirely, for redress, to civil tribunals, and were not indictable; such as false warranty of a horse which proves unsound; selling wine of inferior quality, for wine of better quality; asserting a right to sell a horse, or other commodity, which turned out to be the property of another, *et omne id genus*; but it was also urged, with much earnestness, that the case in question was one of great moral turpitude; this goes only to the degree of moral guilt, but does not vary the case from others just enumerated, and alluded to, as civil injuries only, but cannot be distinguished from them, as to its legal characteristics. But the transaction was said to be gross and flagrant turpitude and injustice, and deserved punishment; so it does, but it cannot be punished here. Our sympathies were appealed to in behalf of the poor negro; but we can have none to bestow; and if we had, perhaps a few drops might have fallen to the poor ignorant traverser who probably did not know his danger, and who, if the opinion of the Court had been against him, would have been doomed to a lot worse than slavery. Therefore it behooved us to reflect well before we decided.

It seems to me from this, and some other cases which I have remarked, during this court, that the sword of criminal justice is longer than it used to be; it sweeps over a larger space. Offenders have either multiplied astonishingly, or the scale of offences is unusually extended; our grand juries are wielding it with a liberal hand. I did not hear the charge of the chief judge at the opening of the Court, and therefore cannot say whether they are acting within the scope of his instructions or not; but I must say, from the number of presentments, and the character of some of them, that there is scarcely a hole or a corner of the county, where offenders might skulk, that their inquisitorial eyes have not inspected, and dragged out the offenders to light. This is as it should be, provided due regard be had, not to involve the innocent (innocent, I mean, in the eyes of the law,) with the guilty, which I confess it is not easy for gentlemen not skilled in the law, always to avoid. If all, or any large proportion of presentments and indictments made, and which probably will be made during this court, be sustained, they display a woful amount and increase of crime.

But to return to my subject. I am willing to lay down this rule, and without some rule we are afloat in an ocean of uncer-

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tainty: "that all attempts to commit an offence, which, if carried into execution, would go to corrupt the fountains of justice, of legislation, or the executive administration of the law; or, if perpetrated, would involve actual violence or breach of the peace, whether statutory or common-law offences, are indictable, otherwise not."

We have adjudged that to incite another to commit an assault and battery, is indictable; this is the only case of the kind that I am aware of; and there I think we have gone to the utmost limit; but I look upon the inciting another to commit a breach of the peace, of more aggravated criminality than an attempt to break the peace one's self. I hardly know how such a case can well be manifested; a man might, in a passion, say and threaten, that he would beat another, but is held back by friends and others present; or he might approach another in a threatening manner, and that other might have the heels of him, and run away. I should question much whether either of these demonstrations of hostility are indictable. We have not gone that far yet, and I shall think more of it when the case occurs.

Finally, the penitentiary law has provided for the case of attempting to sell a free man for a slave, and declared under what circumstances it shall be punishable; here we have all that is wanted, or deemed by the sovereign authority to be wanted; and shall we legislate too on the same subject; and declare that an act or acts, not coming up to the statutory description of the offence, are punishable? I cannot, for it does not fall within my rule as I have before laid it down; nor, in my opinion, within the sound principles of law; nay, I reserve to myself the privilege of considering even this rule a little further, and when a case occurs within it, shall deem myself at liberty to narrow it, if, after more reflection I shall think it right to do so. I have suggested it for the present, as safe to steer by, so far as it touches the case before us.

 UNITED STATES v. WILLIAM COWING.

A justice of the peace has authority to administer an oath to an answer in chancery. In an indictment for perjury, the materiality of the facts sworn to, must appear in the indictment, either by averment, or by a statement of facts which show their materiality.

THIS was an indictment for perjury in the answer to a bill in chancery.

The defendant demurred to the indictment, because it neither averred that the allegations in which the perjury was said to con-

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sist, were material, nor did it aver facts showing their materiality.

The plaintiffs in the bill in chancery were merchants; the defendant was their clerk. The bill charged him with embezzlement of the complainants' money and goods.

The defendant, in his answer, denied the embezzlement; and in order to account for the fact, charged in the bill, that he had large sums of money deposited in some of the banks to his credit, he stated in his answer a variety of facts and circumstances tending to show that he had honestly acquired the money so deposited.

The perjury assigned was in the allegation of those facts and circumstances.

Mr. Semmes, for the defendant. The defendant was not bound to answer specially how he obtained the money; nor was his answer to that effect, evidence for him.

The indictment does not state that those matters were material, nor do they appear to be so upon the face of the indictment.

If the bill would have been bad upon demurrer, perjury cannot be assigned in the answer; for the answer was immaterial and unnecessary. The Court dissolved the injunction, (which was to prevent him from withdrawing his funds from the respective banks in which they were deposited, upon the allegation that they were the funds of the complainants,) upon the bill itself without answer; upon the ground that the complainants did not in their bill show a title to the specific funds lodged in the banks; that they had no right to require the defendant to discover the matters charged; and that the matter charged amounted to felony; to which he was not bound to answer.

If the Court had no jurisdiction, or if the defendant was not bound to answer, he could not commit perjury in the answer.

The assignment of the perjury is only upon immaterial allegations in the answer. By thus assigning the perjury upon the immaterial allegations of the answer, they admitted the truth of the material allegations. 2 Russell on Crimes, 519, note 2; *Rex v. Dunton*, Ry. & Mood. N. P. C. 109; *Abrahams v. Bunn*, 4 Burr. 2255; *Bartlett v. Pickersgill*, 4 East. 577, note b.

Mr. Jones, on the same side. The gist of the charge, in the bill in chancery, was embezzlement of the money and goods of the complainants. It was not a bill for discovery, as ancillary to an action at law, but an original bill for an account of the embezzlement and for general relief. It is true that the complainants say that they have brought a suit at law, and need the defendant's answer, but they do not say to what facts.

If the averments in which the perjury is not assigned are true (and they must be taken to be so,) the others will appear to be immaterial; and it is settled law that either it must appear upon

the indictment that the matter, in respect of which the perjury is assigned, was material, or it must be expressly alleged to have been so. 2 Russell, 517, note A. 549, 541, 542; *Commonwealth v. Knight*, 12 Mass. Rep. 274; 2 Chitty, Cr. L. 305, 306.

It is also necessary that the indictment should expressly contradict the matter falsely sworn to by the defendant; and the general averment that the defendant falsely swore, &c., upon the whole matter, will not be sufficient; the indictment must proceed, by particular averments, to negative that which is false. 2 Russell, 542; *Rex v. Dunton*, 1 Ry. & Mood. 109.

But a justice of the peace has no jurisdiction to administer an oath to an answer in chancery. In England it is taken by a master in chancery, or by a commissioner appointed by the Court. 4 Com. Dig. tit. Justice of the Peace, B. 102; 15 Vin. 215, Perjury E.

Mr. R. S. Coxe, for the United States, was stopped by the Court as to the question of authority of the justice of the peace to administer the oath to an answer in chancery; the authority being expressly given by the ninth rule prescribed by the Supreme Court for the equity practice of the circuit courts.

An answer to a demurrable bill is a waiver of the right to demur. The averment of embezzlement was only an inference from the circumstances stated in the bill. Those circumstances therefore were material; and the facts stated by the defendant to avoid the force of those circumstances, were therefore also material. The case of *Rex v. Dunton*, cited from Ry. & Mood. 109, is not supported by *Bartlett v. Pickersgill*, in 4 East, 577; for in this latter case, the defendant was convicted of perjury in denying a parol agreement void by the statute of frauds. The materiality of the matter is a fact to be ascertained by the jury. *Commonwealth v. Weaver*, MS., Judge Lomax's Opinion.

Mr. Key, on the same side. The defendant had a right to demur or answer to the bill in chancery; but having answered and put the facts in issue, they became material. The bill charged a trust in the defendant and required an account. The Court therefore had jurisdiction. The facts stated by the defendant for the purpose of corroborating his answer are material.

Mr. Jones, in reply. The putting of the facts in issue does not make them material. The materiality of all questions, in a chancery suit, depends upon the purpose for which the suit is instituted; and if it does not appear upon the face of the indictment that the question, upon which the perjury is assigned was material or not, the indictment cannot be supported. *Rex v. Bignold*, 2 Russ. on Crimes, 541, note z.

The COURT (*nem. con.*) was of opinion that the indictment was

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insufficient in not averring the materiality of the facts upon which the perjury was assigned ; and in not stating facts which would show their materiality.

Judgment for the defendant on the demurrer.

 UNITED STATES v. RICHARD SPALDING and ELLEN DWYER.

The Court will not quash an indictment for a conspiracy to cheat by selling a free negro as a slave.

INDICTMENT for a conspiracy to cheat one Washington Roby by selling him a free negro as a slave for life.

The first count charged that the defendants conspired to cheat him by selling to him a certain negro boy as a slave for life, (and as the property of the said Ellen,) whom they then and there offered to sell to the said Roby, and who was then and there a free boy ; and who was not their property ; they, the said Richard and Ellen, then and there well knowing that the said boy was free, and was not their property ; and that in pursuance of and according to their said confederacy they fraudulently attempted and offered to sell, to the said Roby, the said boy, as a slave for life, and as the property of the said Ellen, well knowing that the said boy was not a slave, and was not their property, to the great damage of the said Roby, and against the form of the statute, &c.

The second count charged that the defendants conspired "to sell a free boy" under the false and fraudulent pretence that he was the slave of the said Ellen, and thereby falsely and dishonestly to obtain money by cheating and defrauding the person or persons to whom they might so sell the said boy ; and in pursuance of the said conspiracy "did attempt and offer to sell the said boy as a slave and as the property of the said Ellen to divers persons, namely, to W. R., G. G., and J. D. ; the said defendants well knowing that the said boy was not a slave and was not the property of the said Ellen, to the great damage, &c. and against the form of the statute, &c.

Mr. W. L. Brent, for the defendants, moved the Court to quash the indictment because the conspiracy charged was not to do an act indictable at common law ; cheating by a simple false assertion, not being indictable. He cited 2 Russell on Crimes, 293, 297, 697 ; 4 Starkie, 403 ; and Chitty, 904.

But the COURT (THRUSTON, J., doubting,) refused to quash the indictment.

The cause was afterwards tried, and the defendants were acquitted.

UNITED STATES v. DENNIS LARKIN.

Conversations of the defendant may be given in evidence against him, although not amounting to a confession of guilt, and not corroborated by other testimony; but the Court will not say whether the evidence is sufficient to convict the prisoner. Unnecessary words, not altering the nature of the charge, inserted in an indictment, by the grand jury, may be rejected as surplusage, after verdict.

INDICTMENT for highway robbery of George Milburn.

Mr. Milburn, the witness, testified, upon the trial, that, when the prisoner was arrested and brought into the magistrate's office, and before he was informed for what he was arrested, the prisoner asked on what night it was. Being informed that it was on the night of the 17th of October, he said he could prove by his bedfellow, that he was not there. Milburn then stated to the prisoner all the circumstances of the robbery, as he had learned them from others, as well as from his own knowledge, until he was made insensible by the blow which knocked him down. To which the prisoner replied that Milburn had no witnesses but colored persons, and they were not good witnesses against a white man. The prisoner also trembled, and appeared to be much agitated by the witness's statement of the circumstances.

Mr. Hoban, for the prisoner, prayed the Court to instruct the jury, that such evidence, without corroborating circumstances, is not evidence against the prisoner. He cited Wheeler's Digest, which refers to a case decided in North Carolina.

But the COURT (THRUSTON, J., absent,) refused so to instruct the jury, and referred to the note to the same case, in Wheeler, and to 4 Starkie, 48, 53.

The jury having found the prisoner guilty, his counsel moved, in arrest of judgment, because the indictment, which has only one count, charges two distinct offences, subject to different punishment, namely: highway robbery, and an assault and battery, with intent to kill; the first being punishable under the 6th section of the Penitentiary Act, by imprisonment and labor in the penitentiary for a period of not less than three nor more than seven years; and the other under the 2d section, of not less than two nor more than eight years.

The indictment, as sent to the grand jury, by the district attorney, was a simple indictment, in common form, for highway robbery; the grand jury, however, interlined the words, "and battery, with intent, him, the said Milburn, to kill," and also the words, "did beat and wound," so as to make it read thus: "with force and arms, at the county aforesaid, in the common highway, there, in, and upon one George Milburn, in the peace of God

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and of the United States, then and there being, feloniously did make an assault and battery, with intent, him, the said Milburn, to kill, and him, the said George Milburn, did beat and wound, in bodily fear and danger of his life, in the highway aforesaid, then and there feloniously did put; and bank-notes of the value of three hundred dollars; and silver coins of the value of one dollar and fifty cents; and a gold watch and seal of the value of one hundred and seventy-five dollars; and one pencil-case of the value of one dollar; and one penknife of the value of seventy-five cents, the money and property of the said George Milburn, from the person and against the will of the said George Milburn, in the highway aforesaid, then and there feloniously and violently did steal, take, and carry away, against the peace and government of the United States, and against the form of the statute, in such case made and provided."

The Attorney for the United States cited 1 Chitty, Cr. Law, 254, 255; *The Commonwealth v. Gillespie*, 7 Serg. & R. 469; *The Commonwealth v. Stoops*, 7 Id. 491, and *Commonwealth v. Harman*, 12 Id. 69.

The COURT (*nem. con.*) overruled the motion, being of opinion that the assault and battery were included in and made a part of the offence of robbery, as much as the stealing, taking, and carrying away of the money, watch, &c., which are also charged; and therefore, although the words, "with intent to kill," are added, they are merely stated as words of aggravation, and may be rejected as surplusage; so that the count does not charge more than a single offence. See *Young v. Rex*, in Error, 3 T. R. 98, 103, 106, 107; 1 Chitty, Cr. L. 231, (b,) 248, 249; and *The King v. Fuller*, 1 Bos. & Pul. 180.

The prisoner was sentenced to the penitentiary for six years.

 UNITED STATES v. NEGRO HENRY SIMMS.

To constitute robbery, there must be fear or force.

A slave, charged with larceny, is to be tried and punished by a justice of the peace.

INDICTMENT for highway robbery of one Latimer, by snatching his watch from his side pocket, it being fastened to his neck by a ribbon, which was broken by the first snatch, the owner not having been put in fear.

Mr. Key, for the United States, cited Russ. & Ry. Cr. Ca. 419; 3 Chitty, 805.

Mr. Hoban and *Mr. Morfit*, for the prisoner, cited *Rex v. Gosnil*, 1 Carrington & Payne, 304; S. C. 11 Serg. & Louder, 400.

Digges v. Eliason.

The COURT (*nem. con.*) was of opinion, that, in this case, the force was not sufficient to constitute the offence of robbery; and intimated that the law was correctly stated by Garrow, B., in *Gosnil's case*, 1 Car. & P. 304.

The jury found the prisoner guilty of simple larceny, and that he was a slave; whereupon, the Court, not having jurisdiction of simple larceny by a slave, ordered him to be taken before a justice of the peace, to be dealt with according to law.

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NORAH DIGGES, Administrator of William D. Digges, v. E. E. ELIASON, Administrator *de bonis non*, of John Eliason.

The limitation of twelve years in the Maryland Statute of Limitations, of 1715, c. 23, § 6, does not continue to run from the date of the original judgment if it has been revived by *scire facias* within the twelve years. The expression "twelve years' standing," means, twelve years' standing without any proceeding towards enforcing payment.

The plea is not supported unless twelve years have elapsed since the revival of the judgment by *scire facias*.

THIS was a *scire facias* to revive a judgment obtained by William D. Digges, in his lifetime, on the first Monday of June, 1820, and which had been revived by an award of execution thereupon, on the first Monday of December, 1826.

The defendant pleaded the Maryland Act of Limitations of April, 1715, c. 23, § 6, and averred that "the debt, or thing in action," in the *scire facias* mentioned, was above twelve years' standing at the time of the impetration of the writ.

The plaintiff replied that the original judgment was revived by an award of execution thereupon on the first Monday of December, 1826, and that twelve years had not elapsed since the said award of execution to the day of the impetration of this writ of *scire facias*, namely, the 14th of March, 1838.

To this replication there was a general demurrer.

Mr. Marbury, for the defendant, contended that a *scire facias* and *fiat* thereupon, is not a new judgment, and does not in any manner affect the original judgment. It stands unaltered as it stood before, and continues to stand until the expiration of the twelve years from the rendition thereof, when it becomes "a debt, or thing in action above twelve years' standing," and "not good or pleadable;" and cannot "be admitted in evidence."

The language of the 6th section, is different from that in the 2d section, which merely declares that the actions therein mentioned shall be commenced or sued within the time and limitation therein expressed, and not after. It is a limitation of the action

only ; but in the 6th section the language applies to the cause of action ; and declares it shall not be good or pleadable, or admitted in evidence. It destroys the cause of action itself, not merely the remedy.

A promise to pay a judgment, will not support an action upon the judgment barred by limitation. The action must be upon the new promise.

Mr. Key, *contra*, contended that the judgment was revived and redintegrated by the *scire facias*, so as to become a new judgment, and its standing begins with the revival.

CRANCH, C. J., delivered the opinion of the Court.

The question arising upon this demurrer is, whether the judgment for the recovery of damages and costs is a debt, or thing in action above twelve years' standing, within the meaning of the 6th section of the Act of Assembly of Maryland of April, 1715, c. 23, if the Court has, within twelve years next before the issuing of the *scire facias*, awarded an execution thereon.

The words of the act are, "That no bill, bond, judgment, recognizance, statute merchant, or of the staple, or other specialty whatsoever, except such as shall be taken in the name or for the use of our sovereign lord the king, his heirs, or successors, shall be good or pleadable, or admitted in evidence against any person or persons of this province, after the principal debtor and creditor shall have been both dead twelve years, or the debt or thing in action above twelve years' standing."

It is entitled "An Act for limitation of certain actions, for avoiding suits at law."

Although the previous sections contain provisions analagous to some of those of the English statute of 21 Jac. 1, c. 16, yet this 6th section seems to have been original, and intended to limit actions not limited by the statute of James ; namely, actions upon single bills, bonds, judgments, recognizances, statutes merchant, and of the staple, and other specialties.

Although the language of limitation in this 6th section is different from that of the former sections, its object seems to be the same.

Instead of saying that the actions upon these specialties shall be brought within a certain time "after the cause of such action accruing," as in the 2d section, it says that no such judgment or specialty, "shall be good or pleadable, or admitted in evidence, after the principal debtor and creditor shall have been both dead twelve years, or the debt or thing in action above twelve years' standing." The 2d section forbids the action ; the 6th destroys the evidence. The object is the same in both. Both are equally effectual ; both have an exception in favor of those who are under a temporary incapacity to sue ; and both should receive the same

construction. What would save the right of action in one, should save it in the other. It cannot be supposed that the legislature intended that a creditor who recovered judgment and took out his *fiery facias* within the first year thereafter, and so from year to year for twelve years, and upon each writ made a small part of the debt, say one twentieth, should not have another *fiery facias* in the thirteenth year for the balance due upon the judgment. This would be contrary to all analogy in other cases. A creditor who diligently pursues all his lawful remedies in due season, cannot lose his debt by lapse of time. It is evident, therefore, that the legislature by using the terms "twelve years' standing," did not mean merely twelve years from the date of the judgment.

The statute must have a reasonable construction so as to effect its intention without depriving the diligent plaintiff of his rights. Thus by the 2d section actions must be commenced or sued within three years from the time of the cause of action accruing; yet the *capias ad respondendum*, upon which the defendant is taken for a single contract debt, and which is strictly the commencement of the action, may be dated long after the term of limitation has expired, provided the plaintiff has issued a previous *capias* within the term of limitation, and has continued to issue subsequent writs from term to term until the defendant is taken. So, at common law, a plaintiff could never have an execution upon his judgment in a personal action unless he took it out within a year and a day after the rendition of the judgment; for no *scire facias* was given by the common law in such a case; and the plaintiff was driven to his action of debt on the judgment. But when the *scire facias* was given by the statute of 13 Ed. 1, c. 45, the plaintiff might, at any time after judgment, have execution by means of a *scire facias*; and after the return of the execution unsatisfied he might renew it from term to term until he obtained satisfaction. In process of time this renewal of the execution from term to term became a mere matter of form, and the courts permitted them to be entered upon the roll as if issued and continued, (when in fact they were not) from the return of the first writ until the actual issuing of another.

A judgment revived by *scire facias* has no greater vigor, nor longer life, than it had when it was originally rendered. By the award of execution, it is revived for one year, and if the plaintiff did not issue his execution upon that award, the judgment again expired. Hence it was necessary not only to take out the execution within the year after the award, but to continue it from term to term, or at least from year to year. If he did this, he used all necessary diligence, and was not affected by the limitation of a year and a day.

The limitation created by the Act of Maryland, is not limitation of execution, but of the right of action, and is not for a year and a day, but for twelve years; yet the same principle applies to both, namely, that he who uses due diligence in pursuing his right, shall not lose it by lapse of time. As the plaintiff saves his execution from the common-law limitation of a year and a day, by taking out his execution within the year, so it would seem to follow, by analogy, that he should save his right of action by *scire facias* on his judgment, from the statute limitation of twelve years, by issuing it within the term of limitation.

It has been before shown that the expression, "twelve years' standing," cannot mean simply twelve years' date. What then does it mean? We think it means twelve years' standing, without any proceeding towards enforcing payment.

It was an expression in common use in 1715, when the act was passed, and was familiar to the lawyers of that day, as it is to be found in many of the old reporters. Thus in the case of *Hardesty v. Barny*, 2 Salk. 598, it is said, "If a judgment be above ten years' standing, the plaintiff cannot sue a *scire facias* without motion in court; if under ten, but over seven, he cannot have a *scire facias* without a motion at side-bar. Note, if after such motion, and judgment revived by *scire facias*, the defendant dies before execution, the plaintiff must sue a new *scire facias*; but may have it without motion, for the judgment was revived before. *Per Curiam*."

Here it is evident that by the words "ten years' standing," the court meant ten years standing without execution or *scire facias*; for the court says further, "if after such motion, and judgment revived by *scire facias*, the defendant dies before execution," (that is, before the expiration of the year and a day,) "the plaintiff must sue a new *scire facias*, but may have it without motion;" and they gave the reason, "for the judgment was revived before," and therefore was neither of ten nor seven years' standing; so that a judgment revived by *scire facias* within twelve years, is not a judgment of twelve years' standing.

Whether the judgment on the *scire facias* is to be considered as a new judgment for the original debt, is not material, as, according to the long-established practice in the English courts, before the passing of the Maryland Act of 1715, the revival by *scire facias* prevented the original judgments from being considered as standing, within the meaning of that word, in the expression, "ten years' standing."

The opinion in the case of *Hardesty v. Barny*, was given in 1695, and was a declaration of the then long-established practice of the court. The Maryland Act was passed twenty years after

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that case, and probably with full knowledge of that practice. The English authorities, also, generally consider and speak of an award of execution upon *scire facias* as reviving the original judgment, and such also has been the general understanding and language in this country.

Upon these considerations, the COURT is of opinion, that as twelve years had not elapsed between the revival of the judgment by *scire facias* in 1826, and the suing out of the present *scire facias*, the judgment is not barred by the statute.

Judgment upon the demurrer for the plaintiff.

LOMBARD v. CORNELIUS McLEAN.

Copies of plaintiff's account-books are not evidence.

ASSUMPSIT for balance of account; the plaintiff having been the defendant's factor for the sale of glass,

Mr. Marbury, for the plaintiff, offered the deposition of a witness taken in Boston, under the Act of Congress, stating that an account, thereto annexed, was truly copied from the plaintiff's books; the entries in which, with some exceptions, were in the handwriting of the witness, and were true.

The COURT (*nem. con.*) rejected so much of the deposition as related to the books and accounts, the original entries not being produced.

Verdict for the plaintiff.

UNITED STATES v. SOPER & WEBSTER.

The time and place of conspiracy must be alleged in the indictment.

THIS was an indictment for conspiracy to extort money from one William Hickey, by seizing two of his slaves, and confining them in Maryland, as runaways, so that the defendants might claim the reward allowed by the laws of Maryland for taking up runaway slaves.

After a verdict for the United States,

The COURT, upon motion of the defendants' counsel, arrested the judgment, because there was no time nor place of conspiracy alleged in the indictment.

BANK OF THE UNITED STATES v. STEPHEN MACDONALD.

In order to prove notice to an indorser who is a clerk of a printing-office, and who has a separate room in which he attends daily to the business of the office, it is competent for the plaintiff to show, by evidence, that a written notice was left at such room, although the indorser was not there at the time.

After a note is dishonored, and due notice has been given to all the indorsers, the defendant, the last indorser, is not discharged by the holders taking a new note at 60 days, from a prior indorser for the balance due upon the old note, and giving time to such prior indorser without the consent of the defendant.

ASSUMPSIT against the last indorser of William Prentiss's promissory note to John Agg, or order, at 60 days, from April 5, 1831, for \$5,200, payable at the Office of Discount and Deposit at Washington, indorsed by Agg and the defendant.

Mr. R. S. Coxe, for the plaintiffs, in order to prove demand and notice to the defendant, offered to prove, by Michael Nourse, a notary-public, that on the 7th of June, 1831, he called with the note at the Office of Discount and Deposit, in Washington, and there demanded of the book-keeper, payment of the same, and was answered that there were no funds to pay the same; that on the next day he left a written notice of the non-payment of the said note, for the defendant, at the office of the National Journal, in which place he was employed as a clerk at the date of the note; and offered evidence further to prove that the defendant was clerk and bookkeeper of the office at which the National Journal, a daily newspaper, was printed and published, in the city of Washington; that his room was near the front door of the office, and had bars, or lattices, so that when he was not in his room, papers could be put into the room and dropped upon a table or desk; that the said notary-public had served other written notices to the defendant, by putting them into his room, in that manner, in his absence; and he believed that the notice in the present case, had been served in that manner; that the defendant's business required him to be daily at his said room; that he was not then a married man, but lived with his sister, who keeps a boarding-house, or was jointly concerned with her in keeping a boarding-house near the Journal office.

To the admissibility of which evidence the defendant's counsel (*Mr. Marbury*,) objected.

But the Court overruled the objection; and the defendant took a bill of exceptions.

Mr. Marbury, for the defendant, then prayed the Court to instruct the jury "that if they believed from the evidence that after the note upon which this suit was instituted was due and payable, and after due notice given to the defendant of the non-payment

thereof, the plaintiffs took the negotiable promissory note of John Agg, the payee and indorser thereof, payable at sixty days after date for value received, for the balance of principal and interest due on the said note in action without the consent of the defendant, and agreed with the said Agg to wait on said note in action in consideration of his promising to pay curtails and discounts on said new note, and to renew the same from time to time, he, the said Agg, continuing to pay such curtails and discounts until said balance and interest was paid; the said transactions, if found and believed by the jury, constitute a legal and binding obligation on the part of the plaintiff to give time to the said Agg in the payment of the note in action, and discharges the defendant from liability on the same."

Mr. Marbury cited the case of *Cope v. Hunt*, in this Court at March term, 1833, (*ante*, 293,) which was an action against the indorser of Mr. Houston's note, due July 7, 1829, for \$500. The defendant offered evidence of a subsequent agreement between the plaintiff and Mr. Houston that he should assign to the plaintiff ten dollars a month of his pay as a clerk in the Treasury Department, in payment of the note; and that the plaintiff should wait for payment in that manner; that Houston continued to make such payments according to the agreement, until April, 1831; and that this agreement was made without the knowledge of the defendant. *Mr. Marbury* also cited *Starkie on Ev.* part 4, p. 289.

Mr. R. S. Coxe, for the defendant in that case, cited *Bank of United States v. Hatch*, 6 Peters, 250; 5 Vin. Ab. 527, pl. 17, and *Bridgman's Digest*.

Mr. Dunlop, contra, cited *McLemore v. Powell*, 12 Wheat. 554, 556.

The COURT, MORSELL, J., *contra*, on motion of the defendant's counsel, in that case, instructed the jury that such an agreement, if proved, discharged the indorser (the defendant) from his liability.

The jury, however, found a verdict for the plaintiff; and the COURT (MORSELL, J., *contra*), granted a new trial, on the ground that the verdict was against either the law or the evidence, in the case. A new trial, however, was never had in that case, and after continuances for several years, the suit was struck off by order of the plaintiff.

In the present case, the COURT (THRUSTON, J., *contra*), refused to give the instruction prayed by *Mr. Marbury*, as above. (See the case of the *Bank of the United States v. Abbott*, in this Court at May term, 1827, (3 Cranch, C. C. 94.)

Mr. Marbury then prayed the Court to instruct the jury "that

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if they believe, from the evidence, that after the note in action became payable, and after due notice of its non-payment to the defendant, the plaintiffs took a new note in renewal therefor from Agg, the first indorser, the right of action upon the note in suit was thereby suspended against the said Agg, and the defendant thereby discharged."

Mr. R. S. Coxe, contra, cited *Pryn v. Clarkson*, 2 D. & R. 78; *Gould v. Robson*, 8 East, 575; *Maltby v. Carstairs*, 1 Mann. & Ryland, 552.

Mr. Marbury cited *Chapple v. Ashley*, 1 D. & R. 26.

The COURT (*nem con.*, but THRUSTON, J., doubting,) refused to give this instruction also, there being no evidence that Agg's note was taken in renewal of the note of Prentiss, indorsed by the defendant.

Verdict for plaintiffs. A new trial was granted by consent, and at March term, 1836, the plaintiffs struck the suit off, by consent, without costs.

JOHN DEVLIN v. GIBBS AND COYLE.

An execution against two only, upon a judgment against three, is erroneous, not irregular; voidable, not void.

An action for false imprisonment will not lie for an arrest upon an execution which is only voidable, and not void.

Parol evidence is admissible to show that there was in fact no judgment rendered by a justice of the peace, as stated in the execution.

TRESPASS, assault and battery, and false imprisonment.

The plaintiff had been, some time since, arrested upon a writ of *ca. sa.*, issued in favor of these defendants, against himself and one James Kennedy, only, upon a judgment against them jointly with one Hugh Tierney, as recited in the execution; and had been discharged from that arrest by this Court (THRUSTON, J., absent,) upon *habeas corpus*, upon the ground that an execution against two only upon a judgment against three was void; the same appearing upon the face of the execution. The plaintiff thereupon brought the present action; and the principal question was, whether the execution was absolutely void, or only voidable; or, in other words, whether it was irregular, or only erroneous; for, if irregular, it was void; but if erroneous, it was only voidable, and the defendants not liable in this action.

Mr. Bradley, for the defendants, to show that the executions were erroneous only, and not irregular, cited *Reynolds v. Corp and Douglass*, 3 Caines, 267; *Herrick v. Manly*, 1 Id. 253-255;

Butler v. Potter, 17 Johns. 145; 1 Chitty's Plead. 183; Starkie on Ev. part 4, p. 1447, and 1 Arch. Pr. 257.

Mr. R. S. Coxe, for the plaintiff, cited the cases referred to in 10 Petersdorff, tit. Trespass, 279, 402.

The COURT (MORSELL, J., dissenting,) were of opinion that the execution was not irregular, but erroneous; not void, but voidable; and that, therefore, the defendants were not liable in this action.

In the course of the trial the Court permitted the plaintiff to produce parol evidence to show that, in fact, no judgment had ever been rendered by the magistrate.

But the jury found a verdict for the defendants.

BANK OF WASHINGTON v. CHRISTOPHER NEALE.

The cause of action to recover back money paid upon a judgment reversed for error, arises upon the reversal, although the appellate court, at the time of reversal, orders a *venire de novo* to be issued by the inferior court, and the cause is still there pending; and the limitation of the statute begins to run from the time of such reversal.

THIS was an action for money had and received, to recover back money paid upon a judgment afterwards reversed for error.

In May, 1824, Triplett & Neale, of Alexandria, District of Columbia, recovered judgment against the Bank of Washington, in the Circuit Court of the District of Columbia, sitting in Alexandria county, (the cause having been removed to that county, from Washington county,) for negligence in not collecting the amount of an inland bill of exchange deposited in that bank for collection. The Bank paid the amount of the judgment to the agent of the Bank of the United States, upon the order of Mr. Neale, the acting partner of the firm of Triplett & Neale; and the Bank of the United States placed the amount to the credit of Mr. Neale. When the Bank of Washington paid the money, the cashier gave notice to the agent of the Bank of the United States, who received it, that the Bank of Washington would take out a writ of error to reverse the judgment; and that the Bank of the United States would be expected to refund the money, in case of a reversal. The Bank of Washington accordingly brought their writ of error, and the Supreme Court of the United States reversed the judgment at January term, 1828, and remanded the cause to the circuit court, with an order to issue a *venire de novo*. (1 Peters, 25.)

On the 12th of January, 1830, the Bank of Washington brought an action against the Bank of the United States, to recover back

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the money paid on the erroneous judgment, and on the 24th of October, 1830, recovered judgment in the Circuit Court; which judgment also was reversed by the Supreme Court of the United States, at January term, 1832, and judgment ordered to be entered for the defendant, in the court below. (6 Peters, 8.)

The original suit of Triplett & Neale v. The Bank of Washington, which was remanded by the Supreme Court, upon the reversal, with an order for a *venire de novo*, remained pending in the Circuit Court, in Alexandria, District of Columbia, until the 6th of November, 1829, when a verdict and judgment were rendered for the defendant, (the Bank of Washington.)

After the judgment, in the case of the Bank of Washington v. The Bank of the United States, was reversed, the present action of The Bank of Washington v. Christopher Neale was commenced, on the 24th of March, 1832; to which the defendant pleaded the statute of limitations, more than three years having elapsed since the reversal of the original judgment, in January, 1828, but not since the final action of this Court, upon the mandate of the Supreme Court, in that original action; which was on the 6th of November, 1829, as before stated.

Mr. Jones, for the defendant, contended that the plaintiff's cause of action accrued in 1828, when the original judgment was reversed; and that the plaintiffs were under no obligation to wait the issue of the subsequent proceedings upon the *venire de novo*, in the original action. He cited *Wilcox v. Plummer's Executors*, 4 Peters, 182.

Mr. Key and Mr. Dunlop, *contrà*, contended, that, as the Supreme Court, upon the reversal of the original judgment, awarded a *venire de novo*, the plaintiffs could not ascertain how much they had lost, and to which they ought, in equity, to be restored, until final judgment in the original action. Until that time, they could only recover nominal damages.

They cited *Clark v. Pinney*, 6 Cowen, 297; *Green v. Stone*, 1 Har. & Johns. 405; *Isom v. Johns*, 2 Munf. 272, 413, and *Tillinghast on Limitations*, 86, (note.)

The COURT (THRUSTON, J., doubting,) instructed the jury, (upon the prayer of the defendant's counsel,) that the plaintiffs' cause of action accrued upon the reversal of the original judgment, in 1828, and therefore more than three years before the commencement of the present action.

Verdict for defendant.

UNITED STATES v. HENRY SMITH.

The 1st and 12th sections of the Penitentiary Act of the District of Columbia, so far as they relate to the offence of keeping a faro-bank, or other common gaming-table, are to be construed together; and when so construed, they contain a complete description of the offence and its punishment.

THIS was an indictment under the Act of Congress of the 2d of March, 1831, [4 Stat. at Large, 472,] entitled, "An Act for the punishment of crimes in the District of Columbia," commonly called the Penitentiary Act. The offence charged was the keeping "a common gaming-table, called a sweat-cloth."

The defendant having been convicted, his counsel, *Mr. Dandridge*, moved, in arrest of judgment, contending that the term "gaming-table," in the 12th section of the act, was too vague and indefinite to support an indictment, and must be confined to the single offence of keeping a "faro-bank;" as the English statute against stealing "sheep or other cattle," was confined to the stealing of sheep; and the statute against stealing horses did not include a man who stole only one horse. 1 Bl. Com. 88; 6 Bac. Ab. tit. Statute; Plowden, 465.

It was also contended, that, in the 12th section, the words "faro-bank or gaming-table," mean nothing more than faro-bank; the words "or gaming-table" being only expletive of the term "faro-bank."

Mr. Key and *Mr. Carlisle*, *contrà*, contended, that, in considering a statute, the intention of the legislature is the only sure guide to its construction, and that the 1st and the 12th sections are to be construed together, so as to read, "a faro-bank or other common gaming-table."

THE COURT (*THRUSTON, J.*, *contrà*,) refused to arrest the judgment.

CRANCH, C. J., delivered the opinion of the majority of the judges, as follows:

This is an indictment for keeping "a certain common gaming-table, called a sweat-cloth, against the form of the statute in such case provided, and against the peace and government of the United States."

The jury having found the defendant guilty, his counsel has moved, in arrest of judgment, and contends that this indictment is under the 12th section of the Penitentiary Act of the 2d of March, 1831, by which it is enacted, "That every person duly convicted of keeping a faro-bank or gaming-table, shall be sentenced to suffer imprisonment and labor for a period not less than one year, nor more than five years." That the words "gaming-table" are too general, and will not maintain an indictment; and that, if any

offence can be punished under that branch of the statute, it is only the offence of keeping a faro-bank. That there is no punishment, provided by the statute, for the offence of keeping a common gaming-table; and that the words "or gaming-table" are intended to be used as synonymous with "faro-bank," and are merely expletive, not cumulative. That the statute ought to be construed strictly, like the statute against stealing "sheep or other cattle," which, it was supposed, was, by construction, confined to the stealing of sheep; and the statute against stealing horses, which, it was supposed, had been construed not to extend to a person who stole one horse only.

But this indictment was not framed upon the 12th section alone. It is founded on the 1st and 12th sections.

By the 1st section it is enacted, that every person who shall be convicted, in any court in the District of Columbia, of any of the offences therein enumerated, and among others, "of keeping a faro-bank or other common gaming-table," "shall be sentenced to suffer punishment by imprisonment and labor for the time and times hereinafter prescribed, in the penitentiary for the District of Columbia."

And by the 12th section it is enacted, "That every person duly convicted" of "keeping a faro-bank or gaming-table," shall be sentenced to suffer imprisonment and labor, for a period not less than one year, nor more than five years.

The 1st section is complete in itself in regard to the description of the offence, the place where committed, the court in which the conviction must be, the nature of the punishment, the place of imprisonment, and the tribunal to pass the sentence.

It does not fix the term or period of the imprisonment and labor by express words; but it does so by reference to a subsequent part of the act, where the offence was to be again brought into view, and the period of imprisonment and labor limited. This is done in the 12th section, where the sentence for keeping a faro-bank or gaming-table is to be for a period of not less than one nor more than five years.

The 1st and 12th sections, construed together, as they ought to be, complete the legislation upon that subject, and leave no doubt as to the designation of the offence, the tribunal and place in which the conviction is to be had, and the sentence passed, and the nature, extent, and place of punishment.

It has, however, been suggested that the 12th section can derive no aid from the first; because the first is to be considered merely as a preamble enumerating the offences which the legislature intended to subject to penitentiary punishment; and that the 12th section is a substantive and independent enactment, and the only

one which subjects the offence of "keeping a faro-bank or gaming-table," to punishment in the penitentiary.

But any one who reads the first section, must see at once, that it is not a mere preamble, but is as substantial an enacting clause as any other in the whole act. It is indeed the most substantial enacting clause in the act; for there is no other section of the act, except the 14th, (and that applies only to capital cases other than murder, treason, and piracy,) which informs us where the crime must be committed, or by what tribunal, or in what place the sentence is to be passed, or whether the imprisonment and labor are to be in the penitentiary of the District of Columbia, or in any other penitentiary.

Let us, for a moment, consider the 12th section as standing alone, and deriving no aid in its construction from any other part of the act.

The words are, "Section 12. And be it further enacted, that every person duly convicted of obtaining by false pretences any goods or chattels, money," &c., "or of keeping a faro-bank or gaming-table, shall be sentenced to suffer imprisonment and labor for a period not less than one year nor more than five years."

1. "That every person duly convicted;" where? In Maryland? or Virginia? or the District of Columbia? or before what tribunal? The section is silent on these points.

2. "Of keeping a faro-bank or gaming-table;" where? The section is silent.

3. "Shall be sentenced;" where, and by what tribunal? The section is silent.

4. "To suffer imprisonment and labor;" where? In the penitentiary of the District of Columbia? or in any other penitentiary? or in any common gaol? Upon all these questions the section is silent.

It is an act of the Congress of the United States, and there is nothing in the 12th section to confine its operation to this district, or its tribunals; or to acts done within the district.

Now consider the first section.

"Sect. 1. Be it enacted," &c., "That from and after the passage of this act, every person who shall be convicted in any court in the District of Columbia, of the following offences, namely, manslaughter," &c., enumerating several offences; and among the rest, "obtaining by false pretences any goods or chattels, money," &c., "or of keeping a faro-bank, or other common gaming-table," &c., "shall be sentenced to suffer punishment by imprisonment and labor, for the time and times hereinafter prescribed, in the penitentiary for the District of Columbia."

1st. "Every person who shall be convicted in any court in the District of Columbia." This answers the first question which

arose in considering the 12th section ; namely, where must the conviction be ? The first section says in some court in the District of Columbia ; and this answers also the second question which arose upon the 12th section, namely, where must the offence be committed ? For if the conviction is to be in a court in the district, the offence must have been committed in the district or the court could not have had jurisdiction, and the offender could not have been convicted.

It also answers the third question raised upon the 12th section, namely, where and by what tribunal must the sentence be passed ? For if the conviction must be in a court in the district the sentence must be also ; for one court cannot pass sentence upon an offender upon a conviction in another court.

2d. Again, the 1st section says that the offender " shall be sentenced to suffer punishment by imprisonment and labor for the time and times hereinafter prescribed, in the penitentiary for the District of Columbia." This answers the fourth and last question which arose upon considering the 12th section, namely, where is the offender to suffer imprisonment and labor ?

So far, then, is the first section from being a mere preamble, that it is the only effectual enacting clause. Without it, the 12th section, and all the other sections limiting the period of imprisonment and labor, would be of no avail. It is evident that their only purpose and office is to fix and limit the time of imprisonment, and apportion it to the respective offences enumerated in the 1st section ; that they ought to be considered as having no other use ; and that the first section ought to be construed as if the several limitations of the time of imprisonment and labor had been immediately applied to the respective offences as they were enumerated in that section. The first section, so far as it relates to this subject, would then read thus :

Every person who shall be convicted in any court in the District of Columbia, of keeping a faro-bank, or other common gaming-table, shall be sentenced to suffer punishment by imprisonment and labor, for a period not less than one year nor more than five years, in the penitentiary for the District of Columbia.

This we think is the true construction of the act.

But it has been said that the 12th section does not fix or limit the degree of punishment for keeping a common gaming-table.

The answer to this suggestion is that the 12th section has fixed and limited the degree of punishment for keeping all sorts of gaming-tables, which, of course, includes common gaming-tables.

But to this it is objected that the word " gaming-table," is too general and vague to be the subject of a penal enactment. That it cannot be supposed that Congress meant to make it a penitentiary offence if a gentleman should play a game of whist with his

guests in his own house ; and that as they could not have meant that, they meant nothing ; and that therefore the 12th section is to be confined to the punishment of the faro-bank only.

Here, then, we are obliged to resort to construction ; for the plain words of the section are that "every person duly convicted of keeping a faro-bank, or gaming-table, shall be sentenced," &c. By these words, he, who keeps a gaming-table, is equally guilty with him who keeps a faro-bank ; and therefore, in order to get rid of these words of the section we must resort to construction. But when we resort to construction we are bound by the rules which the law has laid down for the construction of statutes. The first and great rule of construction is to ascertain and carry into effect the will and intention of the legislators ; and the second is that in order to learn that will and intention, not only every part of the statute, but every other statute *in pari materiâ*, and even the preambles of statutes, are to be considered. A third rule is that although penal statutes are to be construed strictly, yet even in these the intention of the legislature is to be regarded. *Heydon's case*, 3 Rep. 7.

By these rules of construction, then, in order to ascertain the extent of the term "gaming-table," as used in the twelfth section, we must compare that section with the first ; and there we find that it was the intention of the legislature to punish the keeping of common gaming-tables only ; and that for the degree of punishment they refer to a subsequent section ; which, it is evident can only be the twelfth, because that is the only subsequent section *in pari materiâ*. The rule that penal statutes are to be construed strictly, then comes in and says that the general and comprehensive term, "gaming-table," must be limited to common gaming-tables. Thus the two sections will be perfectly reconciled, and the intention of the legislature carried into effect.

To say that the word "gaming-table," in the twelfth section, has no meaning, or is to be disregarded because it is too general ; or is merely a synonyme with the word "faro-bank," is to violate that rule which requires a statute to be so construed "that if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." Bac. Ab., tit. Statute I. 2 ; *Rex v. Berchet*, 1 Show. 108.

It would also leave the case, of keeping a common gaming-table, unpunished ; contrary to the clearly-expressed intention of the legislature in the first section ; unless, indeed, the common-law discretion of the Court, in punishing misdemeanors by fine and imprisonment, should be considered as applicable to a misdemeanor which the legislature has enacted shall be punished by imprisonment and labor in the penitentiary without limiting the

time of such imprisonment, considering labor and imprisonment as only a substitute for fine and imprisonment.

But upon this it is unnecessary to express any opinion. A construction which would defeat the plain intention of the legislature, ought, if possible, to be avoided; and especially when a reasonable construction can be given which will carry that intention into effect.

A majority of the judges are quite satisfied that the construction which we have before intimated is the true construction of the statute, and that the motion in arrest of judgment must be overruled.

THRUSTON, J. This is a prosecution, under the Penitentiary Law, for keeping a gaming-table, and the motion is in arrest of judgment.

The matter of law for the consideration of the Court, on this motion, is, whether an indictment, charging the keeping a (common) gaming-table called a sweat-cloth, can be sustained under the said law.

I should have not much doubt, from the liberal construction given to penal statutes in modern decisions of the courts, that if the description of the offence contained in the first section of the Penitentiary Act, had been followed out in the twelfth section which annexes the punishment, that the indictment might be sustained; but there is a material, and, in my view, a fatal variance. The first section contemplates the prohibition of, and the punishment for, keeping a faro-bank or other common gaming-table; and had any subsequent section pursued this description, and followed it with a specific punishment for the offence, the case might have been sufficiently clear, and the offence sufficiently set out to sustain the present indictment; but what is the offence set out in the twelfth section? It is the keeping a faro-bank, or gaming-table; now here is a material and most important distinction. If the words, "or gaming-table," can, by any reasonable interpretation and rules of construction, admit of an intention in Congress to have made penal the keeping any kind of gaming-table, other than a faro-bank, which I cannot admit however; then we see an utter want of harmony between the offence set out in the twelfth section, and the one contemplated as a subject of subsequent specific legislation in the first section.

They (Congress) omitted, in the twelfth section to make provision for the offence as set out in the first section; it is a *casus omissus*, and must be supplied, if deemed proper or necessary, by future legislation. The act is carelessly drawn, which is manifest in another instance; the first section, in enumerating the offences to be provided for in the subsequent sections, mentions, among them, petty larceny; if this means any thing, it must mean

petty larceny as a description of offence then well known and settled. Still you find nothing of petty larceny in the subsequent provisions; the law makes, or creates a new constructive petty larceny, extending the sum necessary to constitute it far above the amount necessary to constitute petty larceny at the time of the passage of the act; it is true they have fixed a sum, the stealing under or over which makes the punishment penitentiary confinement, or only fine and imprisonment in the common jail; here is another *casus omissus*, for the crime or offence called petty larceny, although enumerated in the first section as one of the offences to be specifically punished, is not afterwards mentioned throughout the law.

But to return: for what offence of gaming is punishment actually (not contemplatively) provided for? Why the keeping a faro-bank or gaming-table; and what is the difference, it may be asked? I answer substantial, essential, and most important; that characteristic word common is wanted; a word which alone gives existence, I may say vitality to the offence; in which alone lurks the poison baneful to society, which is an essential and indispensable element of every nuisance; without which the same act is no nuisance. Common, means, in the sense in which it is used in the first section, public, and common sense too; and so it will be found in the best expounders of the meaning of words. There is another important word also, in setting out the offence intended, or rather contemplated to be specifically animadverted on, in the subsequent section; namely, the word other. Now this word, other, so separates and disunites the subsequent words, common gaming-table, from the preceding words, faro-bank, as to leave no doubt that other common gaming-tables than faro-banks, were in the contemplation of Congress to be prohibited, and the keeping of them punished; but there is no punishment provided for them: had the twelfth section gone to the extent of the first, no doubt could exist, I should think, as at present advised, that they would have embraced sweat-cloths or tables, among the prohibited games. But I give no opinion as to this because there is enough to arrest the judgment without considering particularly the result of an accordance between the crimes contemplated to be punished and those actually punished.

Again, shall it be said, (as I think I heard intimated,) that the first and twelfth sections may be taken together, and the defects in the twelfth may be supplied, and the meaning and intention of the legislature gathered therefrom. How is this? because in the first section they denounce the keeping of a common gaming-table, and neglect afterwards to provide any punishment for it, shall we be bold enough to send any one to the penitentiary for keeping a common gaming-table? I have read of preambles

affording a clue to unravel a doubtful meaning as to the sense of subsequent enactments in the same statute, by affording a view of the policy of the statute, and the public evil intended to be remedied by it; but I never heard of their being actual enactments, or as supplying the place of them. If a statute were to propose to punish any offence, and to denounce it with all the terms of reprobation which ingenuity could invent, or the enormity of the offence about to be punished could justify, still if the legislature omitted to carry its denunciations into effect, the law would be of no avail. But can you, from the preamble, supply, in the prohibitory and actual penal enactment, the very gist and essence of the crime? Can the words in the twelfth section "faro-bank or gaming-table," be made, with the help of the first section, to be equivalent with "faro-bank or other common gaming-table?" The first section declares that the keeper of a faro-bank or other common gaming-table, "shall be sentenced to suffer punishment by imprisonment and labor in the penitentiary," &c., "for the time and times hereinafter prescribed." Well, through the whole law you find this crime not noticed; but in the twelfth section it is true that there is a definition of crime something like it; something akin to it, but falling far short of it in essential characteristics, which is punished by confinement, &c., and these important characteristics may be supplied, we are told, from the first section. What! supply the only word which is essential? which is the soul of the crime; in which alone the public weal could be concerned, namely, publicity? Who will say, that when the law is advanced as far as the twelfth section, the framers of it might not have changed their intention, and softened the severity of the contemplated provision in the first section? All that the first section shows is, that they did intend to punish a certain crime, but this intention is not carried into effect; but the only offence like this one actually provided for, is a different one in substance and essence. To say the best of it, perhaps, is to say that the legislature overlooked it; it is a *casus omissus*. Let us now come to the twelfth section as it stands in its crippled condition, not propped up by the first section. What do the words "keeping a faro-bank or gaming-table," mean. In my opinion they mean only a gaming-table called a faro-bank, and no other kind of gaming-table. Now let it be considered that faro-bank is no term known to our laws; there is no certain, legal, or established technical meaning attached to the term. Had the words faro-bank stood alone as designating the offence, it might be very equivocal, whether some other bank than a gaming-bank might not be intended. When a new offence is about to be punished, circumlocution is used to describe it; and as the words faro-bank were used as descriptive

of the offence, it was reasonable to make it more certain by adding the words, after the disjunctive "or," "gaming-table," to put it beyond all uncertainty, and that a gaming-table, vulgarly denominated a faro-bank, was intended to be the subject of animadversion. Now as to the denomination, the Act of Maryland, 1797, c. 110, uses the word faro-table, and declares it to be one of the devices used for gaming; and this term, and not faro-bank, was known to the law as a gaming-table, and had it been used instead of faro-bank, there might have been less necessity for those explanatory words, "or gaming-table."

If arson, rape, robbery, or perjury are the subjects of legislative prohibition or punishment, they *per se ex vi terminorum*, are descriptive of the offence, and sufficiently certain. They carry with them and in them a full and perfect exposition or definition of the offence; no explanatory words or circumlocution are necessary; but where shall we look for the meaning and technical offence inherent in the words faro-bank? Suppose a prosecution commenced for keeping a faro-bank; would it not be a preliminary question, what is a faro-bank? Neither the law, nor any judicial precedents, furnish an adequate or settled meaning of the term; you have to resort to evidence to ascertain what a faro-bank is, in which case there may be great diversity of opinion among the learned in the gambling republic, and thus great uncertainty as to the offence the law meant to punish. Would it not be curious to have witnesses before a jury to tell us what murder, arson, rape, or robbery is? We hear facts, and the law defines crimes; if the evidence prove facts amounting to the established and settled characteristics of the crime, the court are judges of the sufficiency of the evidence, and adjudge the party guilty of the crime charged. We look not to evidence, not to the opinion of witnesses, for what constitutes offences known and settled in the law; so that the legal denomination in one word comprises all the constituents of the crime. Not so with the term faro-bank; it is unknown to the law, and is no technical description *per se* of any offence. Therefore, when the legislature mean to punish any act not known and established as a crime by some legal and technical and certain characteristics, it resorts to descriptions and specifications of the facts and circumstances which are to constitute the prohibited act; they would not be satisfied, nor would there be any certainty in it, to prohibit and punish the act, merely by its vulgar, and popular name; and, therefore, it was proper to superadd the words, or "gaming-table," to illustrate more specifically the meaning of the words faro-bank. But with the explanation it is still very loose; but if deemed sufficiently explanatory of the meaning attached to the word faro-bank, it has nothing to do with a sweat-

cloth, or sweat-cloth table. A faro-bank or gaming-table, is only an alternative expression of the same thing. It would be a forced construction to say that when one offence was mentioned, that using another more generic or explicit term, separated from the first by the disjunctive, *or*, that all kind of offences which might fall within the scope of this generic term were intended to be embraced in it. It is most consistent with the rules of construction, to consider the latter words as merely an alternative description of the offence not so clearly expressed or defined in the first term. But suppose they were meant as distinct and independent offences, let us see how the matter would then stand.

To say nothing of the absence of any legal, known, technical meaning of the words, faro-bank, and the necessity of resorting to the uncertainty of human testimony to ascertain what a faro-bank is, I would ask if the words have a known and definite meaning? Is not betting at a faro-bank essential to constitute the keeping it an offence? Then take away the explanatory words, "or gaming-table," or consider them as independent of the words, "faro-bank," and creating a distinct offence; then the keeping a faro-bank without any betting, or gaming, would fully come within the prohibition, and might be accordingly punishable; can this be the meaning of the legislature? Then take the latter branch of the alternative prohibition, and say that the words, *or gaming-table*, mean to prohibit all sorts of gaming-tables, then private gaming-tables are prohibited, and a person having a party of friends at his house, keeping a whist, or loo-table, (and nothing is more common,) he comes within the prohibition, and is liable to the penalty. Could this have been the intention of the legislature? No. Gaming-tables must be common, or public, to make them nuisances, and, as such, only are punishable. Whatever rigid moralists may desire as to the correction of private as well as public morals, legislatures have never gone so far as to visit with vindictive penalties the pleasures or amusements of private families; these are left to the gradual influence of public opinion, or are proper subjects for the press, the pulpit, or writers and lecturers on moral duties.

The conclusions, therefore, to which the foregoing considerations lead my mind, are, that whatever the intention of the legislature might have been to provide, in the specific punishments for the crimes enumerated in the first section of the act, that if they have omitted to provide for any one of them, that one is not punishable. That there is no section of the law, subsequent to the first, that makes the keeping a faro-bank, or other common gaming-table, an offence, or provides any punishment for such offence, by such description of the offence, or other equivalent descriptive words.

That the offence set out and punished in the 12th section, is not the offence of keeping a faro-bank, or other common gaming-table, but only the keeping a faro-bank, or gaming-table; a distinct offence, and not identical in language, meaning, or substance, with those in the first section.

That you cannot supply the defect of description, by any aid to be derived from the first section, because there is an important, substantial, and essential difference in the two descriptions of offences, to wit: the word common is wanting in the latter, which, being the very essence of the offence, can no more be intended, than you can intend, from the preamble of a statute, important words, essential to constitute the crime which the enacting clause professes to punish, because the offence is among those which the preamble contemplates to punish. For example: Suppose the Penitentiary Act, among the enumerated offences, contained that of murder, which it proposed to punish by penitentiary confinement, instead of capitally; when you come to the clause providing for the punishment of the offence, it is described thus: whoever shall kill another, shall be punished by confinement, so and so; could you, because the first section enumerated murder among the crimes to be punished, supply the material and characteristic words, "with malice prepense," from the preamble, or (what is tantamount to a preamble, or is, at least, in the same category,) the first section of the act in question.

According to this view of the case, the description of the offence in the 12th section must be taken alone, and independent of, and unaided by, the 1st section, whether they be taken together as descriptive of one offence, or separately, as descriptive of two offences. I have endeavored to show that the words are descriptive, and intend only one offence, and shall not repeat what I have said as to their being alternate descriptions of the same offence, but will only make one remark: Can I judicially know that a faro-bank is a gaming-table? In what book shall I look to know this? I do find a faro-table recognized in the Maryland Act of 1797, c. 110, but no faro-bank. If, then, the expression, keeping a faro-bank or gaming-table, means two distinct offences, then, by strong implication, a faro-bank is not a gaming-table, because a gaming-table, being a generic term, would necessarily include the species, faro-bank. But if you will place them in antithesis, and faro-bank is not a species of the genus gaming-table, (and a very extensive genus it is,) then faro-bank is a very innocent and harmless diversion, and never was intended to be, nor could be, without great absurdity being ascribed to the legislature, denounced as a crime. The only rational interpretation of the words describing the offence in the 12th section, is,

that the words, or gaming-table, are but an alternate and more precise description of a faro-bank, and inform us that a faro-bank is a gaming-table, without which we could not judicially know it.

The result of the foregoing conclusions is, that a sweat-cloth, or rag-table, is not within the provisions or prohibitions of the 12th section; and as, according to my view, it cannot be extended, even in these more philosophical days of liberal construction, by any aid or support drawn from the preamble, or first section, an indictment for such offence cannot be sustained.

I will add one more remark; all that I have said in the foregoing opinion is exclusively with reference to the case before us, namely, the keeping a sweat-table.

It is probable, from what I have observed, that we may have motions in arrest of judgment for keeping faro-banks; therefore I do not mean that any thing in this opinion commits me, one way or the other, as to this latter offence; if a question on such indictment is made, I shall consider it with all the deliberation in my power. I believe, however, that this particular species of gaming was the one intended by the statute to be suppressed.

There is another important word, used in the description of the offence, which deserves much consideration; and this is the word "keeping," both in the 1st and the 12th sections.

The meaning of this term, as I understand it, gives strength to the intimation, in the close of my argument, that no gaming-tables but faro were intended to be denounced and punished by the act; or, at most, none but such as were fixed, and permanently, or at least, for a considerable period, established; so as to be places of known and common resort.

What is the true import of the verb, *to keep*? Does it not import something more than setting up a table for a day, or during the races, if the proof had so established the fact, which, however, it did not, because the testimony in all the cases tried this term, went to the extent only of a single exhibition of a gaming-table on one day only; or proved only one act of playing, or gaming, by the setter up. Now, can the term "keeping" embrace such a case as this?

If I understand the meaning of the term, it implies some duration or permanency; and that the opening, or instituting, or setting up a gaming-table for one day, or a few days during a public race, if the evidence even went so far, is not keeping a gaming-table within the meaning of the statute. Let us endeavor to ascertain the true import of the term, by illustrations drawn from common usage, as well as from the best dictionaries.

That it is never employed to signify any temporary business or employment or engagement, is evident from innumerable instances

where this verb is used, as in the following instances. This is a rule, as far as I know, without exception. If there be one, I have not discovered it. We say he keeps a hotel, a store, a billiard-table, a register's office, a broker's office, a coach, a horse, a gig, an omnibus, carts for hire, a livery-stable, a school, a mistress, &c.

Now, does not every instance in the examples above quoted show, that the word is only employed in cases of expressing the idea of some permanent and established business? That Congress meant only to strike at those known and established gaming-tables, such as faro, I have no doubt, for the reasons hereinbefore given, but because those dangerous resorts were best known, were prominent in importance and danger, and, therefore, were the particular and exclusive subjects of legislation. They never meant to invade the precincts of the race-field, that annual jubilee of immemorial usage, where the species of petty gambling during the jubilee has been coeval with the festival itself; and tolerated by all the legislatures of the States where this species of annual amusement has been in use. They hardly meant to visit, with the enormous penalty of penitentiary confinement, the poor negroes who kept their fippenny-bit sweat-cloths or rag-tables, during this period, and on this theatre of almost universal relaxation of discipline during this festival.

I have no dictionary at home except Ainsworth's. The Latin word which seems to me to express, most nearly, the English word to keep, is *sustentare*, and this word, in that language, implies to maintain, support, &c., extending its operation and effect beyond the ephemeral existence of a day.

I am unable to give any etymological history of the word, for the want of the proper books, but collect its true import, not only from the corresponding word in another language, from which many of our words are derived, (though the verb, *to keep*, is not, but is most probably of Saxon or Teutonic origin,) but from the sense in which it is, without exception, used in common parlance, and *usus est jus et norma loquendi*.

NEGRO WILLIAM FENWICK v. LAUNCELOT TOOKER.

The right to remove slaves from one county to another in the District of Columbia, under the ninth section of the Act of the 24th of June, 1812, is confined to the inhabitants of the county from which the slaves are to be removed.

THIS was a petition for freedom.

By the Maryland law of 1796, c. 67, which was continued in

force in the county of Washington, D. C. by the Act of Congress of the 27th of February, 1801, [1 Stat. at Large, 103,] it was not lawful to bring into this county any slave for sale, or to reside therein, with some exceptions not material to the present case.

This law was adjudged to apply to a removal of slaves from Alexandria to Washington county, until the Act of Congress of the 24th of June, 1812, [2 Stat. at Large, 755,] by the ninth section of which it is enacted, "That hereafter it shall be lawful for any inhabitant, or inhabitants, in either of the said counties, owning and possessing any slave or slaves therein, to remove the same from one county into the other, and to exercise freely and fully all the rights of property in and over the said slave or slaves therein, which would be exercised over him, her, or them, in the county from whence the removal was made, any thing in any legislative act in force at this time in either of the said counties to the contrary notwithstanding."

The mother of the petitioner was the slave and in the possession of Robert Patton, who was an inhabitant of, and resided in Alexandria county, in the year 1817; and evidence was given on the trial, that in that year she was sold and delivered by him in Alexandria to Mr. Tennison, an inhabitant of Washington county, who took her immediately to Washington county, to reside therein, and that the petitioner was afterwards born in Washington.

Mr. Key, for the petitioner, contended that the power of removal of slaves from Alexandria to Washington, under the Act of 1812, was confined to inhabitants of Alexandria owning slaves therein; and that an inhabitant of Alexandria could not bring slaves from Washington to Alexandria, nor an inhabitant of Washington bring slaves from Alexandria to Washington.

Mr. Jones and *Mr. Bradley*, for the defendant, contended that under the Act of 1812, an inhabitant of Washington, owning slaves in Alexandria, had a right to bring them to Washington; and cited a decision of this Court to that effect in the case of *Lee v. Lee*, in May 1832.

The COURT (*MORSELL, J., contra*,) upon the prayer of the petitioner's counsel, instructed the jury, that if they should be of opinion, from the evidence, that the petitioner's mother, in the year 1817, was living in Alexandria county, the property, and in possession of Robert Patton, then an inhabitant of that county, and residing there; and that Mr. Tennison, then being an inhabitant of, and residing in Washington county, went to Alexandria and there bought her of the said Robert Patton, who thereupon delivered her into the actual possession of the said Tennison in Alexandria, who brought her forthwith to Washington county, to reside therein, then such importation is not within the provision of

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the ninth section of the Act of the 24th of June, 1812; and that if the petitioner was born after that importation, he is entitled to his freedom.

CRANCH, C. J., observed, that in *Lee v. Lee*, the point was decided without argument; and that upon further reflection, his opinion was changed as to the meaning of the word "therein," in the ninth section of the Act of the 24th of June, 1812.

Verdict for the petitioner.

NEGROES SAM AND BARBARA LEE v. ELIZABETH LEE.

A temporary hiring of Virginia slaves in the county of Alexandria, D. C., with intent to evade the law in the county of Washington against the importation of slaves into this county, will not authorize the owner, residing in Washington, to bring them into the county of Washington to reside therein.

The ninth section of the Act of Congress of the 24th of June, 1812, does not authorize an inhabitant of Washington, owning slaves in Alexandria, to remove them to Washington.

PETITION FOR FREEDOM. Upon the trial of this cause on the *venire de novo* ordered by the Supreme Court of the United States at its January term, 1834, (8 Peters, 44) —

This Court, at the prayer of the petitioners' counsel, instructed the jury that if they believe, from the evidence, that the petitioners were the slaves of R. B. Lee, deceased, in the State of Virginia, from whence he removed with his family to Washington county, D. C., where he continued to reside till his death; that in 1820, the petitioners who continued to reside, as his slaves, in Virginia, were by him brought to Alexandria county, and thence removed by him to Washington county to reside, Barbara, in about a year from her coming from Virginia, and Sam in a period of four or six months, and have since resided in the said county of Washington; then, from the said facts, the jury must find for the petitioners, if they shall believe, from the said evidence, that the bringing of the said slaves to Alexandria county was merely colorable, and with intent to evade the law prohibiting the direct importation of slaves from Virginia to the county of Washington to reside therein.

And, at the prayer of the defendant's counsel, further instructed the jury, that an intent to evade the law, as supposed in the foregoing instruction, ought not to be presumed without proof; and that the burden of proving such intent is on the petitioners; and it is left to the jury to weigh the whole evidence in the cause, and decide whether it be sufficient to prove such intent.

The defendant's counsel then prayed the Court to instruct the

jury, in effect, that if Mr. R. B. Lee, being an inhabitant of Washington county, and owner of the petitioners, in Virginia, in 1820 removed them from Virginia to Alexandria, *bonâ fide*, and without intent to evade the law prohibiting the direct importation from Virginia to Washington county, and hired them out there, one for one year and upwards, and Sam for five or six months; and, after their said terms of service, removed them from Alexandria county to Washington county, whereof he continued to be an inhabitant, then such removal from Alexandria to Washington was lawful.

But the COURT (MORSELL, J., dissenting,) refused to give the instruction; being of opinion that an inhabitant of Washington county could not, under the 9th section of the Act of Congress of the 24th of June, 1812, [2 Stat. at Large, 755,] remove his slaves from Alexandria county to Washington county; he not being an inhabitant of the county in which the slaves were, and possessing them therein.

The verdict was for the defendant; and the Court refused to grant a new trial, which was moved for on the ground that the verdict was against the law and the evidence, in the case.

UNITED STATES v. JOHN HILLIARD.

Security, by recognizance, may be taken for fine and costs, in Washington county.

THIS was a *scire facias*, upon a recognizance, for a fine and costs recovered against one Noah Stinchcomb. General demurrer and joinder.

Mr. Dandridge, for the defendant, contended, that, by the common law, all security to relieve a man from prison, was void, and that there is no statute law to justify this recognizance.

Mr. Key, for the United States, submitted the question to the Court, without argument.

CRANCH, C. J. This *scire facias* sets out a judgment against Stinchcomb, and then says: "Whereas, a certain John Hilliard, late of said county, came personally into the said court, and undertook, for the said Noah Stinchcomb, that, if the said Noah Stinchcomb should not pay the said fine, so as aforesaid imposed upon him by the said court, and also all such costs and charges as had accrued or should accrue to the said United States, in the premises, that then he, the said John Hilliard, would do the same for him: Nevertheless, the said Noah Stinchcomb, the fine, costs, and charges aforesaid, to the said United States hath not paid or

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satisfied; nor hath the said John Hilliard done the same for him, according to the force, form, and effect of the promise and undertaking aforesaid, as by the suggestion of the said United States, in the said court, it hath been stated." "Wherefore," &c., "to show cause why the said United States should not have execution against the said John Hilliard for the fine," &c.

There is no law that forbids a plaintiff to take a new security for his debt, from his debtor in execution.

The statute of 23 H. 6, c. 10, making void all bonds taken for ease and favor, is applicable only to sheriffs and other officers. An undertaking in court, by matter of record, is good ground for a *scire facias* and execution.

This kind of security for fine and costs is recognized in the Maryland Act of November, 1793, c. 57, § 16, and by the forms in 2 Har. Ent. 223, 224, and 617.

This being the opinion of the Court, the demurrer is overruled.



UNITED STATES v. WASHINGTON HENNING.

In an indictment under the 17th section of the Penitentiary Act, for the District of Columbia, it is not necessary to aver that the defendant was a "free person." That section does not apply to negroes kidnapped out of the District, and brought within it.

Quære, whether it applies to the seizure or seduction of any free negro or mulatto, not a resident of the District.

THIS was an indictment under the 17th section of the Penitentiary Act for the District of Columbia, of the 2d of March, 1831, [4 Stat. at Large, 472,] by which it is enacted, "That if any free person shall, in the said district, unlawfully, by force and violence, take and carry away, or cause to be taken and carried away; or shall, by fraud, unlawfully seduce, or cause to be seduced, any free negro or mulatto from any part of the said district to any other part of the said district, with design or intention to sell or dispose of such negro or mulatto, or to cause him or her to be kept or detained, as a slave, for life, or a servant, for years, every such person so offending, his or her counsellors, aiders, and abettors, shall, on conviction thereof, be punished by fine, not exceeding five thousand dollars, and imprisonment and confinement to hard labor in the penitentiary, for any time not exceeding twelve years, according to the enormity of the offence."

The first count charged that the defendant did, with force and arms, unlawfully, by force and violence, take and carry away, and cause to be taken and carried away, a certain free mulatto

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boy named Thad. Key, from a certain part of the said district, to wit, from the shore of the Potomac River, in the city of Washington, in the said county and district, to a certain other part of the said district, to wit, to the Pennsylvania Avenue, in the said city, in the county and district aforesaid, and to the house of one W. R. in the said county, and to divers other parts of the said county and of said district, with the design and intention, then and there, to sell and dispose of said free mulatto, and to cause him to be kept and detained as a slave, for life, against the form of the statute, &c.

The second count charged that the defendant, "with force and arms, did unlawfully, by fraud, unlawfully seduce, and cause to be seduced a certain free mulatto boy," &c., as in the first count, "from a certain part of the said district," to wit, &c., "to a certain other part of the said district," to wit, &c., "with the design and intention," &c., as in the first count.

The defendant demurred to the indictment, because it did not aver that the defendant was a "free person," and *Mr. W. L. Brent*, his counsel, contended that as the word *free* was not inserted in the other sections of the act, Congress must have had some reason for inserting it in this section which did not apply to the other sections; which reason could only be that they intended to confine it to free colored persons; for the word *free* is seldom applied to a white man.

Mr. Key, for the United States, *contrà*, contended that the only use of the word "free," in this section, was to prevent it from being applied to slaves, as in the fourth and fifth sections of the act, where it is also used for the same purpose; and that, in each of those sections the word *free* became unnecessary by the addition which was made to the last clause of the act, namely, "that this act shall not be construed to extend to slaves;" but it was not thought worth while to strike the word out of those sections; and it would be a strange construction to say that Congress intended to punish a free colored person for an offence which is rarely committed by that class of persons, and not to punish a free white man for the same offence, which was almost universally committed by persons of that description.

The COURT (THRUSTON, J., doubting,) was of opinion that the seventeenth section of the act was applicable to free white persons as well as to free colored persons; and that it was not necessary in the indictment to aver that the defendant was a "free person," especially as he is therein called "yeoman."

The defendant thereupon had leave to withdraw the demurrer and plead the general issue.

At the trial of that issue, the defendant's counsel moved the

Court to instruct the jury, "that if they believe, from the evidence, that the boy was removed from a place from without the District of Columbia, to a place within it, in the vessel of the defendant, and there taken from said vessel and carried to another place in said district, and offered for sale, with the criminal intent as stated in the indictment, then the jury must acquit the defendant."

The COURT (MORSELL, J., doubting,) refused to give the instruction; but said that if the verdict should be against the prisoner, they would hear a motion for a new trial, upon this question.

The jury found the defendant guilty on the second count, and his counsel moved for a new trial, on the ground of the Court's refusal to give the instruction as prayed; and contended that the seventeenth section of the Penitentiary Act, was only applicable to an original seizure or seduction within the district; not to the case where the kidnapping was in one of the States, and the kidnapped person brought into this district by a continuation of the same force and violence, or seduction.

Mr. Key, for the United States, contended that the case was exactly within the words of the statute; and equally within its spirit.

THRUSTON, J. This is an indictment for attempting to sell a free negro for a slave, contrary to the provision of the seventeenth section of the penitentiary law.

If the Court should be of opinion that the argument, in favor of arresting the judgment, drawn from the inapplicability of the law to the case of free negroes brought from another State, is invalid for any reasons as yet presented to the Court, there is still a further reason, founded on another view of the clause in question, which appears to me very strong.

In the construction of a written law, it is necessary, to understand its true import, to gather the intention of the framers of the law, not only from what they have done, but also from what they have not done; for example, from the consideration of the seventeenth section of the penitentiary law, it is clear that the selling of a free negro, without removal by force or violence, or without seduction, from the place where such free negro may be; for instance, if a man designing to perpetrate such a villanous act, were to take a negro-buyer to some place or spot where his intended victim may be found, without removing him, it is not questioned but that such a case is not criminal under the said seventeenth section. Now, is not this surprising? Is not the guilt the same as if the free negro was removed from the said place, say one hundred or any less number of feet or yards by force, &c.; or seduced thither? Can any reason be assigned,

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but one, for this? Is it possible that all the guilt consists in the removal? Can any man of reflection say this? Then why is this apparently absurd and senseless distinction made, unless there be at the bottom something not discernible at the surface? Could any thing have been more easy or more simple, if Congress did really design to punish the act of attempting to sell a free negro for a slave, than in few words to have enacted, "that whoever shall, in the said district, attempt to sell a free negro for a slave, within this district, shall be punished so and so?" Surely it did not require all this long paragraph of the seventeenth section to effect this end. Then there must have been some very peculiar and more limited object in view. Now what could this have been? For, if we cannot discover some rational cause for all this, we must mark the provision of the law, as it stands, with the impress of nonsense and absurdity. Would it not be more becoming and more reasonable to endeavor to find out some design or purpose, in this seemingly strange enactment; in which case we shall relieve the law from those imputations. Now, in casting it about in my mind to account for this inconsistency, I have discovered, I think, that there is no inconsistency at all; and that the framers of the law meant really to provide only for the cases of an attempt to sell by removal by violence or seduction; in which case my other reasons for believing that the law did not design to embrace foreign free negroes, is fortified. Now, it must be observed that it would be a difficult matter to sell a free negro at his own domicile or place of abode, or even in the public highways, or at any place in which he may be ordinarily found; because every such free negro has friends or relatives who would most probably detect seduction, if attempted, or resist violence, and expose it to public observation so as to prevent the consummation of such a nefarious crime; but if he could be enticed or forced to some receptacle of negro-dealers, or some retired spot where the intended victim was not known, there would be imminent danger of such consummation.

If this be not a probable solution of the difficulty, then what is? Now an imported free negro, being a stranger, has neither friends nor relations, (unless by accident in some special cases,) and therefore is as much exposed to fraud in one place as another; and the violence or seduction may have been perpetrated and consummated before the arrival of the intended victim within our borders.

For these reasons, in addition to others urged before, I am strongly inclined to believe that the legislature meant to make provision only for the District free negroes, leaving those of other States to be taken the same care of by their governments as Congress has thought proper to bestow upon those of our terri-

tory; and which governments have powers to provide for the case of abduction of free negroes from within their limits, or from one place to another, within the same, by force or seduction, as Congress has within our district.

Another reason, too; our district is small, and one hour is sufficient to transport a free negro into a slave State on either side of the Potomac. The danger, therefore, was great to those persons; and, hence, I suppose the severe penalty for such an attempt provided by law. Not so with negroes of other States, who, I am firmly of opinion were not within the contemplation of the framers of the law, nor, in my opinion, within the statute, unless we give a construction to it pregnant with absurd results."

The other judges took time to consider till Saturday, January 16th, 1836.

CRANCH, C. J. The motion for a new trial is grounded upon the refusal of the Court to give the instruction prayed by the prisoner's counsel; which instruction the Court ought not to have given, unless the circumstance, that the free boy had been brought into this district in the defendant's vessel, takes the case out of the statute.

The count, in the indictment upon which the defendant has been convicted, states that the defendant did, by fraud, unlawfully seduce the free mulatto boy from a certain part of this district, (naming it,) to a certain other part of this district, (naming it,) with the design and intention to sell and dispose of the boy to a certain person, (named,) as a slave for life.

And the statute says, "that if any free person shall, in the said district, by fraud, unlawfully seduce any free negro or mulatto from any part of the said district, to any other part of the said district, or to any other place, with design or intention to sell or dispose of such negro or mulatto, as a slave for life; every such person so offending shall, on conviction thereof, be punished by fine, not exceeding \$5,000, and imprisonment and confinement to hard labor, in the penitentiary, for any time not exceeding twelve years."

The case stated in the indictment is the exact case stated in the statute; and the Court must refuse the new trial, unless the defendant can show that his case is clearly out of the spirit of the act.

The spirit of the act is to punish the intention to sell a free colored person as a slave, when that intention is manifested by the overt act of removing him by force or fraud from any part of the district, to any other part of the district, or to any other place. The intent was not only to prevent the sale of free negroes and mulattoes, resident in the district, by persons resident in the

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district, but to throw an obstacle in the way of kidnappers who should have seized free negroes in any of the States, and who should be passing through the district with their prey. I say this was the intent of the statute, because the words of the statute comprehend both cases; the parties in both are in *æquali delicto*; and both classes of free colored persons are equally entitled to protection.

For some time previous to the passing of this act, we know that there were rumors of kidnappers passing through this district from the State of Delaware, and the eastern shore of Maryland, to the southern States, with their booty; and applications had been made, from time to time, to the Court and to the judges, to stop them by writs of *habeas corpus*, and injunction, which, when granted, only served to hasten their departure.

This statute furnished the ground of issuing a warrant to arrest the parties in the first instance.

Before this statute there was no law to which they were amenable here, or by which their flight could be arrested. The act of kidnapping was not committed here; the mere intent to sell was not punishable anywhere; there might be no attempt to sell here; and if there should be, it was not the offence which Congress intended to punish. The offence intended to be punished by the 17th section of the act, was the having a free negro in possession with an intention to sell him here or elsewhere, provided that intention should be accompanied here by the overt act or acts of coercion or control, mentioned in the statute.

If it had enacted that every person who should bring into this district a free negro or mulatto with intent to sell him as a slave, it would have excluded an intention to sell, formed after he arrived here; and would also have excluded the intention to sell resident free negroes and mulattoes.

If it had enacted that whoever should, "in the said district, attempt to sell a free negro as a slave within this district, should be punished," &c., it would have excluded a class of cases of equal atrocity, and in my opinion equally within the spirit of the act, and which are now within the letter of the act; namely, the cases of kidnappers found, with their prey, in the district, or on their passage through it, having no intent to sell it in the district, and not attempting to sell it in the district, but intending to spirit it away into some distant slave-holding State, where the claim of freedom would be lost by the difficulty of procuring the evidence to support it. The act does not purport to punish the attempt, *eo nomine*, but it punishes certain acts done in the district, with intent to sell, either in the district or elsewhere. The words of the statute are very peculiar; and are exactly adapted to the supposed case, as well as to other cases within

the same mischief. If the statute had been confined to kidnappers who should bring their booty from a place out of the district, it would have excluded acts of kidnapping within the district; but the words now include both. If the statute had been confined to the attempt to sell in the district, it would not have reached acts done in the district with intent to sell elsewhere, and it would have left the case open to much litigation upon the question, what acts in the district would amount in law to an attempt to sell. If the statute had merely applied to kidnappers passing through the district with their victims, the offence would not be complete until they were out of our jurisdiction; hence, in order to make it complete within the district, it required a removal from one part of the district to another; and in order to provide for the case of passing through the district, it says, from any part of the district to any other place.

Thus the act punishes the kidnappers who bring the free negro into this district for sale, here or elsewhere; for he cannot well be brought into the district without being removed from one part of the district to another part of the district. If he is brought to the city of Washington by water, he enters the district below Alexandria, and is removed from the district line to Washington. If he passes through the district without stopping, he is removed from one part of the district to another place. If kidnapped out of the district, it is hardly possible that he should be sold in the district without having been removed from one part of the district to another part thereof; it could only happen by the kidnapper's bringing him up just to the line of the district, and selling him there, without passing over it. If kidnapped within the district, it would rarely happen that he could be sold within the district, without having been removed by the kidnapper from one part of the district to another. If such a case could happen, although it would not be within the words of the statute, yet it would be within its spirit, and it would be more certainly within the rules of construction of statutes, to say that it should be construed to be within the letter, than that the other cases, provided for by the express words of the statute, should not be within its spirit. Neither the act of kidnapping, (that is, the original seizure of the free negro,) nor the actual sale, is expressly within the provisions of the statute; but no argument against the validity of the statute can be drawn from that circumstance; for it cannot be inferred that Congress meant to do nothing, because they have not done every thing. It appears to me that they only intended to legislate in regard to kidnappers; and principally in regard to foreign kidnappers bringing their spoils here, *in transitu*, and that their omission to provide for other cases, cannot derogate from what

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they have done. No rule of construction will justify us in saying that the omission to provide for cases equally within the spirit of an act, will exclude those which are expressly provided for by it. If this act has not provided for the punishment of the kidnapper in the district, who shall have sold his victim without having removed him from one part of the district to another part thereof; or, of the importer of a free negro, with intent to sell him as a slave, both of which cases are as much against the spirit of the act as any of those which it has provided for, we cannot thence infer that Congress did not mean to provide for those cases which are within both the letter and the spirit of the act.

If Congress chose to make the overt act of intention consist in the removal of the free negro from one place in the district to another place, in or out of the district, rather than in the importation, I cannot see how it makes void the express enactment of the 17th section of the statute; or why the omission of Congress to provide for the punishment of the offence of actually selling a free negro or mulatto as a slave, (when the case of selling was already provided for by the Maryland Act of 1796, c. 67, in force in this part of the district,) should annul the express words of that section.

The object and intent of the act is the protection of free colored persons, and to throw an obstacle in the way of their being sold as slaves. Congress are as much bound to protect strangers and sojourners in this district, as to protect those persons who are resident herein.

This principle applies as strongly to colored strangers, and sojourners, as to colored residents. Why, then, should we apply to one class, only, the protection which Congress has, in words, extended to both? If we have a right to apply the protection to either, we have a right, (and in a case made out within the words, are bound,) to apply it to both.

Can it be said that Congress cannot punish an act done in the District of Columbia, with a criminal intent, if that intent be to do a criminal act out of the district? Suppose an insurrection of slaves in Virginia, and that the free negroes of Maryland should assemble and arm themselves, with intent to go into Virginia and aid the insurgents; would it not be in the power of Congress to forbid them to pass through the District of Columbia, or to purchase arms or provisions therein with that intent? Suppose there were in Bladensburgh, wagon-loads of inflammatory libels, calculated and intended to be distributed in Virginia with intent to excite insurrection; would not Congress have authority to pass a law prohibiting their transportation through the district, with that intent? Cannot Congress prohibit, by law, the purchase of arms

in the District of Columbia, with intent to commit murder or robbery in Virginia ?

If Congress have a right to pass laws prohibiting those acts to be done in the district, they have a right to affix penalties and punishment to the violation of those laws ; and they are not limited in the degree of punishment, if it be not "cruel and unusual" within the meaning of the 8th article of the amendments of the Constitution.

If, then, Congress may punish some acts done in the district, by persons passing through the district, with intent to commit a crime out of the district, what other acts, done in the district, by such persons, with the like intent, may they not punish ? Where shall the line be drawn ? It seems to me that no such line can be drawn ; and that Congress has power to pass a law for the punishment of any act done in the district, with intent to commit a crime out of the district.

If it should be said that the original criminal intent was formed and to be consummated in Virginia, and that the acts, done in the district, were done with that original intent, which was continued uninterruptedly through all those acts, yet it seems to me that the case is not thereby taken out of the statute ; for it still remains true, that those acts were done with the intent stated in the indictment. It does not seem to me like the case of the thief who had committed larceny in Maryland, and who was found here with the stolen goods in his possession ; nor like the case of the forged papers inclosed in an envelope in one of the States, and forwarded by mail to this district ; in which cases the Court decided that the offences charged, namely, larceny, and the uttering of forged papers, were not committed in this district ; for there was no question in those cases whether Congress might not have made a law punishing the thief for bringing the stolen goods into this district, or for removing them from one part of the district to another, with intent to appropriate them to his own use, or to sell them in some place out of the district. Nor, in the case of uttering forged papers, was there any question whether Congress had not the power to prohibit and punish a person for using the mail for knowingly transporting forged papers with intent to defraud any person ; or to punish any act done, in the district, with a like criminal intent.

If, at the time when the case of larceny was tried, there had been such an act of Congress as is above suggested, and the thief had been indicted under it, and the court had decided that Congress had no power to pass such an act, the case would have been in point. So also in the case of uttering the forged papers. But

as the cases existed, they seem to me to bear no resemblance to the present case.

If this defendant had, previous to the Penitentiary Act, been indicted for kidnapping the free negro here, and the prosecutor had proved that the defendant kidnapped him in Virginia, and brought him here by force or fraud ; then the question would have occurred here, as it did in the case of larceny in Maryland, whether the offence would not continue and accompany the kidnapped person into this district, so as to make it a case of kidnapping here ; and the Court must have decided, as they did in the case of the larceny committed in Maryland, that the offence was complete in Virginia, and that he could not be punished here for the offence of kidnapping which was complete there.

But if, as before mentioned, Congress, by law, made it penal for the thief, who had stolen goods in Maryland, to bring them into the district, with intent to appropriate them to his own use, or for sale, and he had been indicted and convicted under that law, the Court must have given judgment against him ; for it was a new and different offence, committed under a different jurisdiction. So, in the present case, although the defendant cannot be convicted and punished here for the kidnapping in Virginia, he may be convicted and punished for the new offence committed here under a different jurisdiction.

The offence of forcibly or fraudulently transporting, or carrying out of the district, any free negro or mulatto, knowing him to be free, and the offence of knowingly transporting or carrying out of the district any negro or mulatto entitled to freedom at a certain age, and selling him out of the State, as a slave for life, or for a longer term than he has to serve by law, were already provided for by the Maryland statute of 1796, c. 67, § 15, which was adopted by the Act of Congress of the 27th February, 1801, [2 Stat. at Large, 103.] Neither of these offences, however, could be complete until the parties were out of our jurisdiction, and, therefore, could seldom be punished.

The offence of importing into this district any free negro or mulatto, or any person bound to service for a term of years only, and knowingly selling him as a slave for life, or for a longer term than he was by law bound to serve, was also provided for by the same Maryland statute, section sixteen.

By that statute, each of those offences was punishable by a fixed and absolute penalty of eight hundred dollars ; or by confinement to labor for a period not exceeding five years if the penalty should not be paid, or secured to be paid, within thirty days after judgment.

There was, therefore, no necessity for Congress to legislate in

regard to those offences; and no argument can be drawn from their having omitted, in the Penitentiary Act, to provide for what was already provided for; unless it should be supposed that the punishment by fine and imprisonment and labor in the penitentiary, (which may, at the discretion of the court, not exceed a fine of one cent, and imprisonment of one day,) is more severe than an unmitigable penalty of eight hundred dollars, and confinement to labor for a period not exceeding five years, if the penalty should not be paid or secured in thirty days after judgment. I confess it might be difficult to say which chance would be preferred; but I should incline to think that a punishment open to all equitable and mitigating circumstances would be preferable to an absolute penalty of eight hundred dollars, accompanied by the alternate confinement to labor; so that whatever weight the argument can have, it must be small, and, in my opinion, ought not to make void the positive and express provisions of the statute.

I think the case stated in the second count, upon which the defendant was convicted, is exactly in the words and spirit of the seventeenth section of the act upon which the prosecution is founded; that the instruction was properly refused, and, therefore, that the new trial ought not to be granted.

I would observe, also, that there are other objections, to the prayer, which justified the Court in rejecting it; but which have not been noticed in the argument.

It does not state that the defendant brought the free negro to the district; it states that he was removed from a place without the district to a place within the district in the defendant's vessel; but whether he came as a hired seaman, or in any other capacity, does not appear; nor does it appear that the defendant had formed any intent to sell him until after he was landed.

My opinion, however, is not founded upon either of these objections; but upon the ground above stated.

THRUSTON, J. As this case depends entirely on one section of the act of Congress, namely, the seventeenth section of the Penitentiary Act, and the fate of the prisoner depends upon the proper construction of that section, it behooves us, on account of the terrible penalty inflicted on its transgressor, to look at it in every point of view which can aid us in unravelling its meaning. Now this section prohibits, &c., (here the judge read it.) Let us suppose the case of an actual sale of a free person so carried, &c.; what would be the result? This act provides no punishment for the sale, but for the attempt. The Maryland law provides a punishment for the actual sale. Could you punish the seller under both laws because a sale necessarily includes an attempt? If not, under which? Would it be optional with the prosecutor? But the

Maryland Act punishes the offence of selling with not a tenth part of the severity which the act of Congress does the mere attempt to sell. It is true the seventeenth section leaves it discretionary with the judges to impose a less punishment than the *maximum* fixed in the act; but as this depends on the arbitrary discretion, and the mere caprice of judges, whose moderation or severity will be in proportion to their sense of the turpitude of the crime, it is no argument to show that the seventeenth section inflicts a less punishment than the Maryland Act, even for the consummation of the crime. I state this only to show another strange inconsistency in the law; to punish with unexampled severity an attempt to commit a crime, which, if consummated, is subjected to a punishment much more mild and lenient.

But, another strong view of the case has occurred to my mind, since my last imperfect sketch of my opinion of the true construction of the said seventeenth section; and it is this. Suppose the prisoner or traverser, in the case before us, had, instead of attempting to sell in the district, traversed the district with the boy, after landing him at the wharf, and carried him immediately on to Virginia, whence he brought him, how would the matter have stood then? Here would be the case of seduction begun in Virginia, and the attempt to sell also in Virginia; the whole offence perpetrated in Virginia, except the mere transit through the district, which is free to every citizen of the United States, and the world even; and still this case would be within the words of the law; but is it possible that it can be within its spirit? Here is no crime committed against the law, except the mere passage through the district; nay, can it be within the spirit of the act? Was it competent for Congress to punish the act done out of their jurisdiction? not only consummated, but actually commenced out of their jurisdiction? Can it be doubted that if the jury had been instructed, that if the intent and seduction were conceived and commenced in Virginia, the traverser was not within the statute, they would not have acquitted him? Because I put it to the candor of my brother judges to say that there was any more evidence that the seduction began here, than that it did in Virginia; is there a doubt that there was a preconceived intent, when the boy was put aboard the vessel, before its arrival at our shores? or even when he was enticed from Virginia, to bring him here to sell him? What evidence was there that this intent was suddenly conceived after the landing of the boy at the wharf? On the contrary, was not the evidence in favor of the seduction having commenced in Virginia as well as the intent. From the smallness of the boy he was no use aboard; there was no evidence that there was any obvious purpose of taking him aboard as a hand, (not that I remember.)

I have no doubt, from the whole evidence, that both the intent and seduction were conceived and commenced in Virginia; and if so, the offence is not within the jurisdiction of this Court, as *Plympton's case*.

I return to the supposed case of the boy's having been taken through the district and attempted to be sold in Virginia, from whence he was brought. His case is, nevertheless, within the words of the statute. But is it within the spirit? It cannot be; for Congress could not, constitutionally, punish such an act; both the commencement and consummation of the offence, if it be one, would take place out of the jurisdiction of Congress over such subjects; then all the offence, in such case, would be the passing through the district. Why, can it be imagined that if I pass through this district, with an intent to commit even murder or robbery, and attempt both, beyond the district, that Congress could punish it, because, in passing through their territory, I had such an intent in my mind? They surely could do that as lawfully and constitutionally as they can punish me for passing through their territory with a free person, seduced from Virginia, and attempting to sell him after getting back to Virginia; yet this case, according to the opinion of Mr. Key and the Chief Judge, is within the law.

I state these various views of the case, to show how unsafe it is to depend on the words of a statute, if when you come to consider the cases that come within the words, there are a number which, if taken to be within the spirit also, would lead to the most absurd consequences; such as the instances I have stated in this, and in my former remarks. I say, again, that Congress are not competent to punish any offence within the jurisdiction of State tribunals, perpetrated in any of the States; they belong to State sovereignties to punish. Then it is clear they cannot punish one who seduces a slave, or brings him, under any pretence or circumstances from Virginia, and passes through this district with him, and attempts to sell him, in Virginia; no more can they do so, where the person is a Virginian, seducing a free boy from that State, and entertaining the intent there; and brings him to this district, and attempts to sell him, with the intent so conceived in Virginia before his arrival within our jurisdiction. The essence of the offence, the seduction and intent, took place out of this jurisdiction, and therefore there is only the act of attempting to sell, without the seduction and intent; which, if conceived and executed in Virginia, is no violation of the statute; and if the jury had been so instructed, they could not, from the evidence before them, have convicted the traverser; but for the reasons given in this and my former opinion already given, I am satisfied that the act cannot, consistently with any reasonable construction of it,

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apply to citizens of other States, bringing such free person from such States, by force or seduction, and attempting forthwith to sell him here, and therefore I should arrest the judgment; but at all events it seems clear to me that a new trial ought to be granted.

MORSELL, J., said that he had not written any argument, but was of opinion, that if the seduction and intention to sell commenced in Virginia, and continued until the arrival of the boy in the district, the case was not within the spirit of the statute; which he thought was confined to forcible seizures, or fraudulent seductions commenced and completed in the district.

But, as the prayer of the prisoner's counsel for the instruction to the jury, did not state the fact that, in this case, the seduction and intent to sell, were formed in Virginia, or anywhere else out of the district, he was of opinion that a new trial ought not to be granted.

The prisoner was sentenced to one year's imprisonment and labor in the penitentiary.

UNITED STATES v. JOHN CAMPBELL AND THOMAS TURNER.

If two be jointly indicted for robbery, and if one be acquitted and the other convicted, the latter may have a new trial without the other; who may be examined as a witness upon the new trial.

JOHN CAMPBELL and Thomas Turner were jointly indicted for the robbery of Mrs. Queen. Turner was acquitted, but Campbell was convicted, and moved for a new trial on the ground that Turner was now a good witness for Campbell; and that other evidence also had been discovered.

A doubt was suggested whether a new trial could be granted to one without setting aside the verdict as to the other also.

But upon the authority of *Mowbrey's case*, 6 T. R. 619 to 640; and 1 Chitty, Cr. Law, 659, 660,

The COURT (*nem. con.*) granted Campbell a new trial, without disturbing the verdict as to Turner, and permitted Turner to be examined as a witness for Campbell; who was thereupon acquitted also.

UNITED STATES v. THOMAS FITTON.

Upon an indictment against the husband for assault and battery of his wife, she may be examined as a witness against him.

THIS was an indictment for an alleged cruel assault and battery of the defendant's wife.

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Mr. Key, for the United States, offered the wife as a witness against her husband.

Mr. Mason, for the defendant, objected ; but

The COURT (*nem. con.*) permitted her to be sworn and examined. See McNally on Evidence, c. 16, p. 160 to 176 ; 3 Chitty, Crim. Law, 819 ; 1 Starkie, 84, 85 ; 4 Starkie, 705, 706 ; *Davis v. Dinwoody*, 4 T. R. 678 ; 2 Russell, 604, and the cases there cited.

The wife's testimony was slightly corroborated, but strongly discredited by evidence of her habits and conduct.

Verdict for the defendant.

CHESAPEAKE AND OHIO CANAL COMPANY v. BARCROFT *et al.*

An execution upon a supersedeas judgment, confessed more than two months after the date of the original judgment, will be quashed.

THE COURT (*nem. con.*) quashed the execution in this case, because the supersedeas judgment, upon which it was issued, was not confessed until after the expiration of two months after the original judgment. See the following cases heretofore decided by this Court, namely, *Hodgson v. Mountz & Knowles*, at December term, 1806, (1 Cranch, C. C. 366) ; *Smith v. Middleton*, April term, 1821, (2 Cranch, C. C. 233) ; *Mandeville v. Love*, October term, 1821, (Id. 249) ; *McSherry v. Queen et al.*, April term, 1823, (Id. 406) ; *Holmes v. Bussard*, April term, 1823, (Id. 401) ; and *Thomas v. Elliot*, October term, 1823, (Id. 432.)

UNITED STATES v. NEGRO HENRY SMITH.

Neither a single act of play at a gaming-table, called a sweat-cloth, at the races, nor even a single day's use of it on the race-field, is a keeping of a common gaming-table, within the Penitentiary Act for the District of Columbia.

THIS was an indictment for keeping a certain common gaming-table called a sweat-cloth, against the form of the Penitentiary Act for the District of Columbia, of the 2d of March, 1831, §§ 1 and 12.

The motion in arrest of judgment having, on the 11th instant, been overruled, (*ante*, p. 629,) the defendant's counsel moved for a new trial on the ground that the exhibition and use of a gaming-table called a sweat-cloth, for a single day on the race-ground, during the races, was not such a keeping of a common gaming-table as was within the meaning of the Penitentiary Act ;

the word "keeping" not being satisfied by proof of a single act of play at the table, nor even by a single day's use of it.

After argument, the COURT (MORSELL, J., *contra*,) granted a new trial, on the ground suggested by the defendant's counsel.

CRANCH, C. J. The defendant has been found guilty of keeping a certain common gaming-table, called a sweat-cloth.

A motion for a new trial is made by the counsel of the defendant, because the witnesses only proved that it was exhibited and used one day during the races; which they contend does not amount to the offence of keeping a gaming-table within the meaning of the statute.

The word "keeping," certainly, when applied to time, implies duration. Standing alone without limitation, either by express words, or by the nature of the act or thing which it governs, it implies indefinite duration; as when I say, take this book and keep it; keep at work; keep the mill going. But the duration may be limited to a single day, or hour, or minute, and still it is "keeping." So it may be limited or extended by the nature of the subject to which it is applied. That subject may consist of a succession of acts. Thus we say, "he keeps a ferry;" but a single act of carrying a man across a river in a boat, is not keeping a ferry;—"keeps a tavern;" but a single act of lodging a traveller, is not keeping a tavern. So we say, "he keeps a disorderly house;" but a single instance of disorder in the house, is not the keeping of a disorderly house. Many other instances may be cited, in which the word keeping implies a repetition, or succession of similar acts.

If the thing to be kept, is itself, temporary, the duration intended by the word "keeping," will be temporary, also. If, therefore, Congress had prohibited the keeping of a sweat-cloth at the races, the word "keeping" might, perhaps, have been satisfied by one day's keeping. But if Congress had been asked whether they intended to punish by imprisonment and labor in the penitentiary, any person who should exhibit and keep a sweat-cloth for a single day at the races, I think they would have said that they did not; that it was not the kind of keeping which they contemplated.

I think, therefore, that a new trial should be granted.

THRUSTON, J. This is an indictment for keeping a common gaming-table called a sweat-cloth.

A motion is made for a new trial, grounded on the legal sense of the participle keeping, as intended in the law; and on the construction of which the motion must be allowed or not.

Admitting the verb keep, as used in the law, or rather the participle of that verb, namely, keeping, can be strained to the sense

contended for ; that it may imply a momentary, or a few minutes', or an hour's, keeping a sweat-cloth, (though the testimony, as far as I recollect it, only proved upon the traverser one single instance of his playing at such table,) yet surely it does not become the Court, nor is it consistent with the established principle of construction, nor the avowed humanity of the law, to be astute in searching for a meaning of the word to suit the occasion, against the undoubted sense in which the word is used in common parlance, as I have endeavored to show by numerous instances cited by me in my former remarks, which might be swelled to an indefinite extent, without a single example that could be adduced to the contrary ; take yet another instance or two. We say, "this is a good keeping apple ;" "will this meat keep ?" yet everybody knows that neither the meat nor the apple will keep but a limited time, although they will keep for a time implying duration beyond a day, or week, or two weeks ; the apple will only last sound for a few months, and the meat, (if not in a vessel hermetically sealed,) but a few years ; but in both cases, considerable duration is implied, *ex vi termini* ; where shall we look for authorities to settle the meaning of this most significant term, upon the true construction of which depends the fate of several unhappy beings now in jail ? Shall we seek them in common usage ? That is in favor of the meaning I contend for ? Shall we go to dictionaries, to the best expositions of the term keeping, by the best lexicographers ? They support my definition. Shall we seek for illustrations from parallel and corresponding words in other languages ? They sanction the definition as I have given it, namely : take the Latin language, the verb *sustentare* is the nearest, nay, the true corresponding word in that language to the verb *keep*. This word is translated by Ainsworth, the highest authority, by the words *to sustain* or *maintain* ; and what English scholar will give a meaning to those words implying only a moment's, or even an hour's duration ?

Take an equivalent, and corresponding French word, namely, *entretenir* ; will any French scholar pretend that this word has so limited a meaning ?

Let us then look into the policy of the law, as far as we can gather it from known facts within the knowledge of everybody ; and as the statute has no preamble, I know not where else we can search for the intention of the legislature, except from considering the circumstances which it is probable led to its enactment.

Who believes that Congress either knew or thought of those petty ephemeral tables on race-grounds, which, at most, could only last during the races, and for aught that appeared in evidence

on the trial, did not, in the case before us, continue to be played at beyond a few minutes. Congress has tolerated the principal vice, horse-racing. It is hardly presumable they would have left this higher quarry, and struck at the humbler sweat-cloth, a mere incident to the principal, and as certain to follow it as any incident to follow its principal. Had they designed to strike at them, they would have designated them by a more special description, and more congenial terms; they saw, under their very noses, the established and permanent faro-banks in this city, continuing during the session, and some of them, as I have heard, and believed, for years; the fixed, well-known, and dangerous places of resort, kept as permanently and notoriously as Gadsby's Hotel; established places of seduction to the young and the unwary, and productive of every evil; of loss of fortune, of the earnings of tradesmen, shopkeepers, and, perhaps, laborers, and driving on desperation to seek the means of indulging the most absorbing of all passions, gambling; by fraud, larceny, or robbery, and terminating an unsuccessful career by suicide. These are the formidable results of those great establishments, of those hells, as they are justly called; and which Congress, by fearful penalties endeavored, and I believe designed to put down.

No such consequences can result from sweat-cloths; they are among those mushroom extravagancies of the race-field, springing up with the races and ending with them, and no more heard of till the return of that annual jubilee, which has been in use and practice, without let or molestation till now, for an indefinite period, so as to become almost sanctioned by immemorial usage, unnoticed by the laws of Maryland, whose numerous race-fields, dispersed through the country, with all their concomitants of sweat-cloths, and other similar irregularities, have been kept up, and annually, and even semiannually used and indulged in for a time, the commencement of which is at this day unknown,—beyond the memory of man.

Do you believe that Congress meant, under this short, but sure magic word *keeping*, for magic it is indeed, if it has such wonderful efficacy to put down, so suddenly, this ancient usage, "more honored," it is true, "in the breach than the observance," this petty gambling, confined to the poor, the ignorant, during a few days, at most, of an annual celebration; when, from long habit, and the indulgence of the laws, until now, a general relaxation of manners have been permitted and tolerated during such celebrations; like the *Saturnalia* at Rome, where the laws were almost suspended, for, as well as I remember, three days in the year.

To return to the word "*keeping*." If the word implies exclusively, when unattended with other restraining adjuncts or expla-

natory words, what I have stated above, if it was never known, in common use, to have any other meaning, nor, according to the expositions of the best dictionaries, illustrated by parallel and corresponding words in other languages, no other meaning can be ascribed to it, shall we strain and force it to a meaning thus denied it by common use, and such authorities, in order to convict the prisoner, and send him to the wretched confinement of the penitentiary, because, to our more cultivated minds and more improved moral sense, he has indulged in practices which shock our feelings? It is against every principle of construction to construe a criminal law not only liberally, but with unprecedented license against the accused; but, on the contrary, if the words, so far from having any force against him, are entirely in his favor, will even admit of a construction to save him, by any reasonable intendment, it is our duty, and comports with the known humanity of the law, to give them that construction. Shall we, I say, arbitrarily strain the word to a sense not justified by common use, nor the most authorized expositions of it by the best expounders, and illustrations drawn from other languages, in order to take in this case, because we think he deserves punishment? He is a profligate fellow, and therefore the word means so and so, and he deserves to be punished, although no instance of such meaning can be found, of the word, unless it be limited and restricted to such meaning, by other words or adjuncts, clearly abridging the known and acknowledged sense of it. For example, we say, "he kept his bed a whole day;" "will you keep my place for me until I return?" in the first case, limiting the duration of the keeping, by express words, to a day; and in the latter, by like words or adjuncts, to the time of the return; but the law says, whoever shall "keep a faro-bank or gaming-table," without any words of limitation. Now why should we be thus astute in seeking to bring the traverser within the formidable penalty of the statute, by resorting to an unusual, forced, and unauthorized construction of a single term or expression, on the true import of which his fate hangs? Why should we do this thing? Is it because these poor creatures, born and raised in poverty, ignorance, and darkness, and without any chance or means of moral culture, have done what shocks our more cultivated minds, or our religious or moral sentiments? Are we reformers, or are we judges, to administer the law as it is, and not as we think it ought to be, to the poor and rich with equal hand, and leave reformation to be worked out where alone it can and ought to be, by the wisdom of the laws, or the spread of knowledge and diffusion of learning, or by the influence of moral and religious instruction, by the ministers of religion?

United States v. Negroes Beddo and Hanson.

UNITED STATES v. NEGROES BEDDO AND HANSON.

Free negroes and mulattoes, not born of white women, are not competent witnesses against free negroes and mulattoes not in a state of servitude by law.

THE defendants were convicted of a cheat, by passing and imposing a paper having the appearance of a bank-note, upon a free negro, born of a free colored mother.

The only witnesses for the prosecution were free negroes and mulattoes, born of free colored mothers.

The defendants were free mulattoes.

After the trial, it was discovered by *Mr. Bradley*, the defendants' counsel, that Beddo, one of the defendants, was a mulatto, born of a white woman, and not in a state of servitude, by law; and he now moved for a new trial, on the ground that a free negro or mulatto, born of a free colored woman, is not a competent witness against a free negro or mulatto, born of a white woman, and not in a state of servitude by law. He contended, that, upon the principle, "*partus sequitur ventrem*," a mulatto, born of a white woman, is, in law, a white person, and, if not in a state of servitude by law, is entitled to all the privileges of a white person.

The Maryland Act of 1717, c. 13, entitled "a supplementary act to the act relating to servants and slaves," (1715, c. 44,) recites, that, "Whereas it may be of very dangerous consequence to admit and allow, as evidences in law, in any of the courts of record, or before any magistrate, within this province, any negro or mulatto slave, or free negro, or mulatto, born of a white woman, during their servitude, appointed by law, or any Indian slave, or free Indian, natives of this or the neighboring provinces.

"II. Be it therefore enacted," &c., "That from and after the end of this present session of assembly, no negro or mulatto slave, free negro, or mulatto, born of a white woman, during his time of servitude by law; or any Indian slave, or free Indian, natives of this or the neighboring provinces, be admitted and received as good and valid evidence, in law, in any matter or thing whatsoever, depending before any court of record, or before any magistrate within this province, wherein any Christian white person is concerned."

"III. Yet, nevertheless, when other sufficient evidence is wanting against any negro or mulatto slaves, free negro, or mulatto, born of a white woman, during their servitude by law; or against any Indian, native of this or the neighboring provinces; in such case, the testimony of any negro or mulatto slave, free negro, or mulatto, born of a white woman, or Indian, native of this or the

neighboring provinces, may be heard and received, as evidence, according to the discretion of the several courts of record, or magistrate, before whom such matter or thing against such negro, mulatto slave," &c., "shall depend; provided such evidence or testimony do not extend to the depriving them, or any of them, of life or member."

It was contended, by the defendants' counsel, that, as the third section of this act expressly authorizes the courts to receive the testimony of any slave, free negro, mulatto born of a white woman, against any slave, free negro, or mulatto born of a white woman, during their servitude by law, an inference arises, that a free negro, or mulatto born of a white woman, cannot be received as a witness against a free negro, or mulatto born of a white woman, not in a state of servitude by law; so that, in no case, can the testimony of a colored person be received against another colored person who is not a slave, or in a state of servitude by law.

On the other side, it was argued by *Mr. Key*, for the United States, that, from the 2d section of the act, as strong, if not a stronger and clearer inference may be drawn, that negroes and mulattoes, not in a state of slavery or servitude by law, are competent witnesses in all cases.

The second section is prohibitory; the third is presumptive.

The second prohibits the receiving as witnesses only slaves, or persons in a state of servitude by law, and Indians; and even then only in a matter wherein any Christian white person is concerned. It contains no prohibition to receive free negroes and mulattoes who are not in a state of legal servitude, even in the case where a Christian white person is concerned; nor to receive the testimony of slaves and free negroes and mulattoes in a state of legal servitude, and Indians, in cases where no Christian white person is concerned.

But as all public prosecutions, in the year 1737, when that act was passed, were in the name of the Lord Proprietary, they were cases wherein a Christian white person was concerned, and no slave or colored person, in a state of servitude by law, could be received as a witness therein. For this reason the third section commences with the words, "Yet, nevertheless;" as if to say, that although, by the second section, slaves, and persons in a state of legal servitude, were generally to be excluded in cases wherein a Christian white person is concerned, yet, in prosecutions in the name of the Lord Proprietary against slaves and persons in a state of servitude by law, the courts may, in their discretion, receive the testimony of slaves, and persons in a state of servitude by law, provided such testimony do not extend to the depriving them of life or member.

The third section contains only an exception to the generality of the second ; and the two sections construed together, (as they ought to be,) amount to this ; that the testimony of slaves and persons in a state of legal servitude, shall not be received in any matter wherein any Christian white person shall be concerned except in public prosecutions against slaves or persons in a state of servitude by law. The inference (arising from the admission of slaves, free negroes, and mulattoes, in a state of servitude by law, as witnesses only against slaves, free negroes, and mulattoes, in a state of servitude by law,) that free negroes and mulattoes not in a state of servitude by law, are excluded in all other cases, is rebutted by the inference (arising from their exclusion, in the second section, only in matters wherein any Christian white person is concerned,) that they are admissible in all other cases.

This inference is strengthened by the preamble, which only complains of the admitting "as evidences in law, in any of the courts of record, or before any magistrate, within this province, any negro or mulatto slave, free negro or mulatto born of a white woman during their servitude appointed by law, or any Indian slave or free Indian;" thus showing, that the incompetency resulted from the condition of slavery or servitude, and not from color.

The COURT (CRANCH, C. J., dissenting,) granted a new trial as to both defendants, upon the ground, as it was understood, that free negroes and mulattoes, not born of white women, were not competent witnesses against free negroes and mulattoes not in a state of servitude by law.

After the granting of the new trial, the Attorney for the United States, finding that there were no witnesses for the prosecution other than free negroes and mulattoes born of colored women, ordered a *nolle prosequi* to be entered with the leave of the Court.

JOHN LAIRD'S EXECUTOR v. ELIZABETH DICK *et al.*

Letters testamentary granted without security, agreeably with the will of the testator, may be revoked by the Orphans' Court, upon the petition of creditors.

THIS was an appeal from an order of the Orphans' Court made on the 25th of August, 1835, revoking the letters testamentary because the executor had not complied with an order of that court requiring him to give security and return an inventory ; the letters having been originally granted on the 30th of July, 1833, accompanied by an order saying that "no security to the executor's

Dick v. Laird.

bond is required, nor any inventory of the personal estate to be returned to the court."

The order of revocation was made on the petition of the creditors of the testator.

The letters were originally granted without security in consequence of a clause in the will, by which the testator requests that no security should be required of his executor, at least as far as any gift or bequest was concerned; and that an appraisement should be dispensed with. The executor was not the residuary legatee.

THIS COURT, upon consideration of the Testamentary Law of 1798, c. 101; sub c. 3, §§ 3 and 8; sub c. 10, § 9, and sub c. 14, §§ 6 and 7, affirmed the order of the Orphans' Court revoking the letters testamentary.

DICK *et al.* v. LAIRD.

Upon a creditor's bill against the surviving partner of a mercantile firm, a receiver may be appointed.

THIS was a bill in equity by creditors against the surviving partner of the firm of John Laird & Son, for a settlement of the partnership accounts, &c., and for the appointment of a receiver.

The counsel for the plaintiffs cited *Bloodgood v. Clark*, 4 Paige's Rep. 576; *Vann v. Barnett*, 2 Bro. C. C. 158; *Creuzè v. Bishop of London*, Id. 253; *Philips v. Atkinson*, Id. 272; *Jenkins v. Jenkins*, 1 Paige's Rep. 243; *Osborn v. Hyer*, 2 Paige's Rep. 242; *Harding v. Glover*, 18 Ves. 281.

The answer admitted all the material facts of the bill.

The COURT (*nem. con.*) ordered a receiver to be appointed, and to give security in the sum of \$10,000.

CIRCUIT COURT OF THE UNITED STATES.

MARCH TERM, 1836, AT WASHINGTON.

GUSTAVUS A. McCLELLAN v. JOHN WITHERS.

A person furnishing materials and labor in the erection of a building in the city of Washington in the District of Columbia, cannot claim the benefit of the lien given by the Act of Congress of the 2d of March, 1833, c. 79, after the expiration of two years from the commencement of the building, unless an action shall have been instituted or the claim filed in the clerk's office within three months after performing the work and furnishing the materials.

THE plaintiff, on the 25th of June, 1835, filed in the clerk's office his claim against the defendant, amounting to \$1,711.98, and dated November 6th, 1833, and on the 29th of July, 1795, sued out a writ of *scire facias*, stating the filing of his claim "in pursuance of the Act of Congress entitled," &c., "to be enrolled among the records of the said court, and which was so enrolled, as by the record thereof in the office of the clerk of the said court remaining, manifestly appears. And whereas the said G. A. McClellan alleges that the said sum of \$1,711.98 is still due to him and unpaid, and asks for a *scire facias* against the said J. W. for the recovery of the same; and because it is right that those things which are rightly done and transacted should be brought to a due execution: You are therefore hereby commanded that by good and lawful men of your bailiwick you give notice to the said J. W. that he be and appear before the said Circuit Court to be held at the city of Washington on the fourth Monday of November next, to show if he hath or can say any thing for himself why the said G. A. M. ought not to have his execution against him for the said sum of \$1,711.98 according to the force, form, and effect of the law aforesaid, if he shall think fit, and further to do and receive what the said Court shall then and there consider concerning him in this behalf; and have you then and there the names of those by whom you shall give him notice, and this writ. Witness," &c.

The defendant having appeared at the return of the *scire facias*, the usual judgment was entered, that the plaintiff should have his execution; whereupon a special *fieri facias* was issued, reciting that in pursuance of the Act of Congress entitled, &c., a *scire*

facias "was sued out by a certain G. A. M. against a certain J. W. for the recovery of the sum of \$1,711.98 for 179,500 bricks laid in walls by the said G. A. M. for the said J. W. in erecting or constructing the building on the south part of lots one and two," &c., (describing the situation of the houses,) "belonging to him the said J. W. And whereas afterwards, in the said Circuit Court begun and held," &c., "on the 4th Monday of November, 1835, the said G. A. M. by consideration of the said court had leave to issue execution against the said building erected on the said lots No. one and two," &c., "towards satisfying unto the said G. A. M. as well the said sum of \$1,711.98 as also the sum of \$10.53 for his costs and charges by him in that behalf laid out and expended. You are therefore hereby commanded, that, of the said building erected on the said lots, one and two," &c., "you cause to be made and levied the sums of money aforesaid, and have the same before the said Circuit Court, &c., on the fourth Monday of March next, to render unto the said G. A. M. the debt, costs, and damages aforesaid. Hereof fail not at your peril, and have you then and there this writ. Witness," &c. Issued 25th February, 1836.

The Act of Congress of the 2d of March, 1833, c. 80, [4 Stat. at Large, 659,] entitled "an Act to secure to mechanics and others payment for labor done and materials furnished in the erection of buildings in the District of Columbia," after giving a lien upon all buildings, thereafter erected, for all debts contracted for labor and materials done and furnished in erecting the same, provides "that no such debt for work and materials shall remain a lien on the said houses or other buildings, longer than two years from the commencement of the building thereof, unless an action for the recovery of the same be instituted, or the claim filed, within three months after performing the work or furnishing the materials, in the office of the clerk of the court for the county in which the building shall be situated."

Mr. R. S. Coxe, moved the Court to quash this execution because irregularly issued and irregularly awarded. The claim filed, upon which the *scire facias* was issued, shows that the work was done and the materials furnished before the 6th of November, 1833, and the claim was not filed until the 25th of June, 1835; and it is shown that the building was commenced thirty days before the 29th of June, 1833, so that the two years had expired since the commencement of the building and no suit was instituted, nor claim filed within three months after the work was done and the materials furnished.

The *scire facias* ought to have been to show cause why judgment should not be rendered against the defendant, not to show cause why execution should not issue. There was no judgment

 Smith v. Elwood.

upon which an execution could issue, and the act does not authorize an execution to be issued without a judgment. The second section only authorizes the court to render judgment, as in the case of a summons.

Mr. Z. C. Lee, for the plaintiff, contended that the motion to quash the proceedings is now too late. The defendant ought to have appeared at the last term; and he cited *Smith v. Woodward & Yerby*, at April term, 1821, in this court, (2 Cranch, C. C. 226); *Nichols v. Pearson*, MS. in *Mr. Redin's* notes; *Riggs & Gaither v. Barron*, and *Johnson v. Glover*, at May term, 1825, (2 Cranch C. C. 678,) and *Union Bank v. Crittenden*, at April term, 1821, (2 Cranch, C. C. 238); Tidd, 434, 452, 470, 476.

The COURT stopped *Mr. Coxe*, in reply, and said that as the plaintiff had not brought his suit, nor filed his claim within three months after the materials furnished, and two years had elapsed after the commencement of the building, (which was thirty days before the 29th of June, 1833,) and before the filing of the claim, (which was on the 25th of June, 1835,) the lien had expired before the issuing of the *scire facias*.

Fieri facias and proceedings quashed.

THOMAS GODY v. JAMES K. PLANT.

Justices of the peace have no authority to bind out an orphan child while the Orphans' Court is in session.

UPON petition of Thomas Gody to be discharged from the service of James K. Plant, who claimed the petitioner as his apprentice, it appearing that he was bound out by two justices of the peace, as an orphan, upon a day in which the Orphans' Court was in session.

The COURT discharged the apprentice, being of opinion that under the Maryland Acts of 1793, c. 45, and 1794, c. 47, the justices had no power to bind out an orphan while the Orphans' Court was in session.

HENRIETTA SMITH v. ISAAC ELWOOD.

Justices of the peace have no power to bind out an orphan child not brought before them.

If the Court discharge an apprentice, they will order him to be bound out by the Orphans' Court to a person named in the order.

HENRIETTA SMITH, a colored child, between nine and ten years of age, by J. A. M. Duncausen her next friend, filed her petition

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stating that she has no parent but her mother, a free colored woman of bad character, and unable to maintain the petitioner; that for three or four years past she was taken care of by Mrs. Dunkley, from motives of charity, who recently, on leaving this city, provided a home for the child with the said Duncausen, where she now is, and who is willing to keep her as an apprentice. That the mother, to prevent the child being bound to the said Duncausen, has recently gone before two justices of the peace and entered into some writing purporting to be an indenture of apprenticeship, binding the child to one Isaac Elwood, who claims her as his apprentice.

That the child was not brought before the said justices, and that it was done on the day of the sitting of the Orphans' Court. It prays that Elwood and the mother may be cited to appear and answer the petition; that the supposed indentures may be declared void; and that the said Elwood and the mother may be enjoined from taking the child.

The answer of the defendants denies all the facts charged in the petition, except that the mother was unable to maintain the child; and that the child never was before the justices.

Mr. W. L. Brent, for the defendant, contended that it was not necessary that the child should be before the justices at the time of binding, or at any other time.

The COURT, however, (*nem. con.*) was of opinion that the justices had no jurisdiction, as the child was not before them.

Mr. Duncausen and *Mr. Elwood*, each applied to the Court to have the child bound to him. The Court said they were willing to hear the statements of both, and any evidence which either might produce.

Mr. Duncausen then read a statement of the facts which preceded the present application; whereupon

The COURT ordered the child to be discharged from the indentures, and to be bound out to *Mr. Duncausen* by the Orphans' Court, on the terms mentioned in the discharged indentures; *CRANCH, C. J.*, doubting; being rather of opinion that it was a case in which the Court could only discharge, and could not make, any further order.

UNITED STATES v. STOCKWELL AND CROPLEY.

Upon an indictment for a riot it is not necessary to prove an agreement or proposal to do the unlawful act before it was done, or at the time of doing it; but from the doing of the act, accompanied by declarations of an intent to do it, the jury may infer a previous intent and agreement to do it, and mutually to assist each other in doing it; and in the absence of all contradictory evidence they ought so to infer.

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After an instruction has been given by the Court to the jury, at the request of either party and argued by counsel on both sides, the Court will not permit counsel to argue the same question of law to the jury in contradiction to the opinion of the Court.

The right of the jury to decide the law, as well as the fact, in a criminal case, results only from their power to find a general verdict.

The question whether one fact can be inferred from another, is a question of law, and to be decided by the Court; and if, in law, the inference can be drawn, it ought to be drawn, if there be no contradictory evidence.

INDICTMENT FOR A RIOT. It charged that the defendants and six others to the jurors as yet unknown, "with force and arms at the county aforesaid, did on the 2d of April, 1835, unlawfully, riotously, routously, and tumultuously, assemble together to disturb the peace and government of the United States, and to break into and destroy the dwelling-house of one Martha Nailor in said county; and being so assembled," &c., made "great noises, riot, tumult, and disturbance," "and remained together, making such noises, riot, tumult, and disturbance and breaking, for a long space of time, namely, for the space of five hours then next following, to the great terror and disturbance not only of the citizens of the United States there and thereabouts inhabiting, &c., but of all, &c., passing and repassing in and along the public highways, and against the peace and government of the United States."

Upon the trial *Mr. W. L. Brent*, for the defendants, moved the Court to instruct the jury "that should the United States have failed to prove, to the satisfaction of the jury, that an agreement, or proposal, to attack the house was made before the attack was made, or at the time of the attack, the defendants are entitled to an acquittal;" which instruction the Court gave; but at the prayer of *Mr. Key*, the District Attorney, also instructed them "that if they should believe, from the evidence, that an attack was made on the house of the witness, by the traversers, and two or more persons, who had there assembled together with declarations that they were attacking 'the rats,' and would have out Bell, to revenge the wrongs of an injured craft, then the jury may therefrom infer a previous intent of the parties so to attack the said house, and a previous agreement so to do and mutually to assist each other in doing the same; and in the absence of all contradictory evidence, they ought so to infer."

After these instructions were given by the Court, *Mr. Brent* proposed to argue to the jury that the Court had erred in giving the last instruction; but CRANCH, C. J., informed him that the Court would not permit him to do so.

Mr. Brent then observed to the Court that he thought this rule infringed the right of the jury to decide the law as well as the fact.

CRANCH, C. J., replied that the right of the jury to decide the law, was only the right to find a general verdict which includes both the law and the facts of the case. That the question whether one fact can be inferred from another is a question of law, and to be decided by the Court; and that if the inference can, in law, be drawn, it ought to be drawn by the jury, if there be no contradictory evidence.

UNITED STATES v. WILLIAM LODGE.

Upon an indictment for stealing bank-notes against the Act of Congress of the 2d of March, 1831, § 9, it is not necessary to produce them upon the trial; and if they have been recovered by the owner and passed away, their contents and purport may be proved by parol.

INDICTMENT for stealing "one promissory note of the Bank of Washington for the payment of five dollars, of the value of five dollars; one other bank-note of the Bank of New Lisbon, Ohio, for the amount of five dollars, of the value of five dollars; one note of the Corporation of Georgetown for the payment of two dollars, of the value of two dollars; three silver coins of the goods and chattels of one Edward Simms, then and there being," &c., against the form of the statute; that is, the Act of Congress of the 2d of March, 1831, [4 Stat. at Large, 472,] "for the punishment of crimes in the District of Columbia," section nine, which enacts "that every person convicted of feloniously stealing, taking, and carrying away, any goods or chattels, or other personal property, of the value of five dollars or upwards, or any bank-note, promissory note, or any other instrument of writing, for the payment or delivery of money, or other valuable thing, to the amount of five dollars or upwards, shall be sentenced to suffer imprisonment and labor," &c.

There was no evidence as to the coins; and *Mr. Giberson*, for the prisoner, objected to parol evidence as to the bank-notes, because they were not produced, the witness, the owner, having passed them away.

The COURT said they were inclined to think that parol evidence may be given of the contents and purport of the notes, but would reserve the question upon a motion for a new trial, if the prisoner should be convicted.

The witness found the notes upon the prisoner before he left the shop; and knew the Bank of Washington note by an indorsement upon it of the name "Cloakey."

Verdict, guilty of stealing the notes only.

Mr. Giberson and *Mr. Dandridge*, for the prisoner, moved, in

United States v. Kurtz.

arrest of judgment, and for a new trial; and contended that the judgment ought to be arrested,

1st. Because the indictment does not pursue the words of the statute upon which it is based.

2d. Because it does not state that the notes and coin, therein described, were the property of the prosecutor, at the time the larceny is said to have been committed.

And that a new trial ought to be granted, because,

1. It was not competent or proper for the United States to give parol evidence, as to the contents of the notes, without having first proved that the notes were lost, destroyed, or mislaid, and, if the latter, that due diligence had been used to find the same.

2. That the Court ought not to have admitted evidence of the contents of the notes, and that they should have been produced at the trial, 1st. Because they are the best evidence. 2d. Because, if produced, it would have been competent for the accused to show that they were counterfeit; or, 3d. That they were notes of broken banks, and therefore of no value; or, 4th. That they were not such as the banks could be compelled to pay or redeem.

The COURT, however, overruled both motions, and sentenced the prisoner to the penitentiary.

UNITED STATES v. WILLIAM KURTZ.

An indictment for stealing "sundry pieces of silver coin of the value of twenty-five dollars," is too vague.

INDICTMENT for stealing "sundry pieces of silver coin of the value of twenty-five dollars, of the goods and chattels of one Nicholas Callan."

Mr. W. L. Brent, for the defendant, moved to quash the indictment, because the description of the property was too uncertain; and contended that the number and kind of coins should have been stated, and cited Starkie on Criminal Pleading, 218, and 440; 2 Russell on Crimes and Misdemeanors, 168. "The general rule is, that the goods stolen should be described with such certainty as will enable the jury to decide whether the chattel, proved to have been stolen, is the very same with that upon which the indictment is founded, and show judicially to the court, that it could have been the subject-matter of the offence charged, and enable the defendant to plead his acquittal or conviction to a subsequent indictment relating to the same chattel." In p. 169, he says: "An indictment for stealing '£10 in moneys numbered,' is not sufficient; some of the pieces of which that money consisted should be shown." *Rex v. Fry*, Russ. & Ry. 482.

Mr. Key, contra, cited 1 Chitty, Cr. L. 235, and 3 Id. 946, 947, that certainty, to a common intent, is sufficient.

(But in 3 Chitty, 946, it is said, "The quantity and number of the things stolen, should appear with certainty, as essential to the legal description of the offence; and also because the prosecutor cannot claim restitution of any other goods than those stated on the record. 2 Hale, 182. An indictment for stealing twenty sheep and ewes, is bad, because the number of each sort is not stated. So it is bad to say that the defendant feloniously stole divers sheep, or doves, without expressing their number." And in p. 947, it is said, "An indictment for stealing money should specify the pieces of which that money consisted; saying '£10 in moneys numbered,' is not sufficient." See, also, *Peel's case*, Russ. & Ry. Cr. Cases, 407; *Rex v. Edwards*, Id. 497; *Rex v. Chalkley*, Id. 258, and *The King v. Johnson*, 3 M. & S. 547.)

The COURT (THRUSTON, J., absent,) was of opinion that the description of the things stolen was too vague, and quashed the indictment. A new indictment was found by the grand jury. [*Post*, 682.]

UNITED STATES v. FENWICK *et al.*

In an indictment for a riot, it is sufficient to state that the defendants assembled to disturb the peace, and being so assembled, did such and such unlawful acts.

It is an indictable offence, at common law, to incite others to insurrection, tumult, and riot; and the indictment need not aver that insurrection, tumult, and riot were thereby excited.

The defendants were permitted to give evidence, that Walker, a colored man, whose sign was pulled down by the mob, had recently said that the sign was cut down, at his request, to prevent further excitement.

If there is no evidence against one of the defendants, he may be examined as a witness for the other defendants.

If a large number of persons assemble, for the purpose of seizing a man on account of insulting language which he was reported to have used, and agree to accomplish that object, and attempt to execute it by tumultuously surrounding his house, and entering it with intent to seize him without legal authority therefor, this is a riot; and the jury may infer the intent from the acts done; and ought so to infer, in the absence of all contradictory evidence.

It is not necessary, in order to convict the defendants of a riot, that the intended act of violence should have been perpetrated, or that they should all have been present, doing the act.

It is not necessary that an act of violence should have been perpetrated.

Upon the count for inciting others to insurrection and riot, it is not necessary to prove an act of violence done in consequence of the incitement.

When either party, in a criminal prosecution, has asked an instruction to the jury, upon a question of law, and the other party has proceeded to argue the point before the Court, and the Court has given an instruction upon that question, the counsel has no right to argue the same question of law before the jury.

If either party does not join in the argument to the Court, but insists upon arguing it to the jury, the Court will require him to proceed with his argument, and will, after the argument is closed, give or refuse the instruction prayed, or give such other instruction as the Court shall think proper.

United States v. Fenwick.

If three or more persons assemble, with intent, forcibly and violently to disturb the public peace in a tumultuous manner, and with intent mutually to assist each other against any who should oppose them in the execution of such purpose; and if, with force and violence, and in a tumultuous manner, they proceed to disturb the peace, either by a show of armor, threatening speeches, or turbulent gestures, to the terror of the people, this constitutes a riot, whether or not they committed the particular act of violence charged in the indictment.

The marshal has a right to take the posse, and to call on all citizens to aid him in arresting the rioters; and the citizens have a right to arm themselves.

The public excitement is no justification of the intended force and violence.

An intent to seize a man by force, for uttering slanderous or offensive words, and to carry him by force, anywhere, even before a justice of the peace, without a legal warrant, is an unlawful intent.

All concerned in an unlawful assembly are equally guilty of the subsequent acts done by any of them, in furtherance of the common object of the assembly; and all who join them after the original meeting, and who were present at any subsequent act, and either active in doing, countenancing, or supporting, or ready, if necessary, to support the unlawful act, thereby become parties to the riot, and are equally guilty of all their subsequent acts.

INDICTMENT FOR A RIOT. The first count charged that the defendants, on, &c., at the county of Washington, did unlawfully, riotously, routously, and tumultuously assemble and gather together, to disturb the peace of the United States in the said county; and being so then and there assembled and met together, did then and there make great noises, riot, tumult, and disturbance; and then and there unlawfully, riotously, routously, and tumultuously surrounded and entered the house of Snow & Walker, and destroyed their goods, &c., and remained and continued together making such noises, riots, tumults, and disturbances, for a long space of time, to wit, for the space of five hours and more, then next following, to the great terror and disturbance, not only of the good citizens of the United States in the said county, but of all other good citizens of the United States in the said county there passing and repassing, in and along the public streets and common highways there, in contempt of the laws and against the peace and government of the United States.

The second count was for inciting others to insurrection and riot.

The defendants pleaded the general issue.

April 7, 1836. Upon the trial, *Mr. W. L. Brent*, for the defendants, objected to evidence of any other act of violence than such as occurred at the house of Snow & Walker. The first count does not state for what unlawful purpose the defendants assembled, except to disturb the peace. It does not state any particular unlawful act that they assembled to do. 1 Russell, 267, and *Regina v. Gulston*, 2 *Ld. Raym.* 1210, where it is said that *aliquid illicitum*, is too general.

Mr. Key, *contra*, cited 2 Chitty, 485, 488, and 490, note.

The COURT (THRUSTON, J., absent,) said, that they had in some

previous case, decided that it was sufficient that the defendants assembled to disturb the peace, and being so assembled, did so and so; and referred to the forms of indictment in the Crown Circuit Companion, 384 to 390.

Mr. Hoban, for some of the defendants, moved the Court to instruct the jury, that the second count does not state an indictable offence. It charges the defendants with inciting others to insurrection, tumult, and riot. There is no such offence as "insurrection" in this country. "Tumult," is too vague, and so is "riot." Starkie on Crim. Pleading, 78; *The King v. Holland*, 5 T. R. 625. It ought also to have averred that insurrection, tumult, and riot were thereby excited. *Regina v. Daniel*, 6 Mod. 99, 101, 182; *Regina v. Collingwood*, Id. 288.

Mr. Key, contra, cited 2 Chitty, 507, where there is a similar form of indictment.

The COURT (*nem. con.*) refused to give the instruction.

Mr. Brent, for the defendants, then offered to prove that Walker, a colored man, and partner of Snow, had, this morning, said that the sign was cut down at his (Walker's) request, to prevent further excitement.

Mr. Key, contra, objected that Walker's declarations, now made, are not competent evidence to prove his request.

The COURT, however, (CRANCH, C. J., *contra*.) overruled the objection, and permitted the evidence to be given.

The United States having closed their evidence, and there being nothing proved against Mr. Moore, one of the defendants, he was examined as a witness for the other defendants.

Mr. Hoban, for Beedle and Wetherall, two of the defendants, prayed the Court to instruct the jury,

1. That if they do not believe, from the evidence, that they were present at the destruction of the property of Snow & Walker, on 6th Street, or if present, not aiding and assisting thereat, the jury should acquit them.

2. That if the jurors believe, from the evidence, that the defendant Beedle was in company with a crowd, armed with clubs, and no act of violence or outrage proved, he should not be found guilty of a riot.

3. That to find the defendant guilty under the second count in the indictment, they must believe, from the evidence, that he actually persuaded, and tried to induce three or more persons tumultuously to assemble to break the peace, and do some act of violence.

Mr. Hoban contended,

1. That the act of violence, intended, must have been perpe-

trated; and that those only who were present, and did the act, can be found guilty.

2. That if no act of violence was perpetrated, it was no riot.

3. That, in order to convict the defendant, under the second count, there must have been an act of violence done in consequence of the incitement.

Mr. Key, contra, cited *United States v. Gooding*, 12 Wheat. 469, and contended that if the defendants assembled to do one unlawful act, and they do another unlawful act, they are guilty; and thereupon prayed the Court to instruct the jury, —

That if they believe, from the evidence, that the defendants, or any of them, assembled together with others, to the number of nearly one hundred, for the purpose of seizing one Beverly Snow, on account of insulting expressions which they had heard he had used, then such assembly of such persons, agreeing together to accomplish such object, and their attempting to execute such purpose by tumultuously surrounding his house, and entering it with intent to seize him, without legal authority therefor, if believed by the jury from the evidence, constituted a riot; and the jury may infer the intent from the acts done; and ought so to infer, in the absence of all contradictory evidence.

The Court (*nem. con.*) refused to give the instruction prayed by *Mr. Hoban*, and gave that prayed by *Mr. Key*.

After the Court had decided the point of law which had been argued by *Mr. Key* and *Mr. Hoban*,

Mr. Brent, for the defendants, other than those for whom *Mr. Hoban* appeared, offered to argue the same point of law to the jury, in opposition to the instruction which the Court had given.

The Court said, that after a point of law had been argued by the counsel of the parties, and the Court had, at the request of either party, instructed the jury upon the point so argued, they could not permit the question of law to be reargued to the jury, in opposition to the instruction given by the Court.

Mr. Brent contended, that, as the jury had a right, in criminal cases, to decide the law as well as the fact, he, as counsel for some of the defendants, had a right to argue the law to the jury; and cited 1 Chase's Trial, p. 5 and 34; 2 Id. p. 59, 60; *Croswell's case*, 3 Johns. Cas. 352, 376; *Erskine's Speeches*, 152; *Van Horne v. Dorrance*, 2 Dallas, 307; *The State of Georgia v. Brailsford*, 3 Id. 4.

Mr. Key, contra, contended that if there can be appeal from the court to the jury, upon a question of law, it can be only in capital cases. *Commonwealth v. Blunt*, 4 Leigh, 689; *Davenport's case*, 1 Leigh, 588.

Mr. Hoban, observed that he appeared for two of the defend-

ants only, Beedle and Wetherall; and that his argument in their defence ought not to prejudice that of the other defendants.

Mr. Bradley, who appeared, with *Mr. Brent*, as counsel for the other defendants, contended that the rule suggested by the Court, applied only to cases where the defendants have asked an instruction to the jury, or have joined in the argument to the Court, upon an instruction asked by the Attorney of the United States, and thereby waived their right to argue the law to the jury; and stated that they had objected to the Court's giving an instruction to the jury before they had argued the law to them.

The COURT said that they had not heard any such objection, and had considered the counsel for all the defendants as joining in the argument upon the motions of *Mr. Hoban* and *Mr. Key* to the Court for instructions to the jury.

But as they had made such objection, although not so understood by the Court, they were allowed to argue the whole law of the case to the jury, MORSELL, J., observing that the Court never denied the power of the jury to decide the law as well as the fact, in criminal cases by finding a general verdict; but when either party has asked an instruction, and the other party has proceeded to argue the question before the Court, and the Court has given an instruction upon that question, the counsel has no right to argue the same question of law before the jury. If the party does not join in the argument to the Court, but insists upon arguing it to the jury, the Court will require him to proceed with his argument, and will, after the argument, give, or refuse, such instruction, or give such other instruction as the Court shall think proper.

Mr. Key replied to the argument to the jury, and concluded by requesting the Court to instruct them upon the whole law of the case; whereupon

The COURT instructed the jury, as follows:

As the counsel for some of the defendants have argued before you upon the law as well as upon the facts of the case, and the Attorney of the United States has requested the Court to state to you the law upon the whole case, we will endeavor to do so.

In criminal cases, the jury has a right to give a general verdict, and, in doing so, must, of necessity, decide upon the law as well as upon the facts of the case.

As we have not taken notes of the evidence, not having had an expectation of being called upon to give an opinion upon the whole case, we leave the question of fact entirely to your consideration.

But, as to the law, we say, that, if from the evidence you should be satisfied that the defendants, or any of them, assembled, to the number of three or more, with intent forcibly and violently to

disturb the public peace in a tumultuous manner, and with intent mutually to assist one another against any who should oppose them in the execution of the purpose aforesaid, and they did thus assemble with force and violence, and in a tumultuous manner to disturb the peace, either by show of armor, threatening speeches, or turbulent gestures, to the terror of the people, then such assemblage, with such intent as aforesaid, so executed, constituted a riot, whether they broke into Snow's house, or not.

That the marshal has a right to take the posse, and to call on all citizens to aid him in arresting the rioters, and that the citizens had a right to arm themselves.

That the excitement, whatever might be the cause, was no justification of the intended force and violence.

That the intent to seize Snow, by force, for uttering slanderous or offensive words, and to carry him, by force, anywhere, even before a justice of the peace, without legal warrant, if such case should be proved to the satisfaction of the jury, was an unlawful intent.

That the intent may be presumed from the act; for every man is presumed to have intended to do what he has done, until the contrary is proved.

That all concerned in the unlawful assembly are equally guilty of the subsequent acts done by any of them in furtherance of the common objects of the assembly; and all who joined them after the original meeting, and who were present at any subsequent act, and either active in doing, countenancing, or supporting, or ready, if necessary, to support, the unlawful act, thereby became parties to the riot, and are equally guilty of all their subsequent acts.

The jury found six of the defendants guilty, and recommended them to the mercy of the Court.

When they were brought up for judgment, CRANCH, C. J., said, Before passing sentence upon the defendants who have been convicted in the cases of riot, the Court has deemed it proper to make a few observations upon the nature and tendency of the offence. Civil society cannot exist without laws to protect the weak against the strong. These laws are of no avail unless supported by the strength of the whole society, or, at least, of a majority. They must be executed according to prescribed forms, by known, responsible, public functionaries, selected for the purpose. Our judicial tribunals, and their forms of proceeding, have received the sanction of many ages, and by them the laws have been administered, to the general satisfaction of the people under all the various forms of government through which we and our ancestors have passed. In a regular government no laws can be made, or

United States v. Murphy.

executed, but according to the forms prescribed by the Constitution and fundamental laws of the state or society. No voluntary association of individuals, unknown to the Constitution, have a right to make or execute the laws, or to judge, condemn, or punish those whom they may deem to be offenders, and to punish whom they may suppose the law to be inadequate to, however pure or holy may be their motive; and if, in their fanaticism or their frenzy, they should take the life of their victim, they would be guilty of murder. Such, also, would be the judgment of the law, if any unauthorized individual, or combination of individuals, should snatch from the officers of justice, even a condemned murderer, and proceed themselves to execute the sentence. But the example of such an usurpation of judicial or executive functions, if unpunished, would be far more pernicious to society than the mere act of murder which would have been committed. The reign of terror would have commenced, and no one could foresee the extent of its ravages. It is easier to create an excitement than to allay it; for every degree of excitement tends to pervert the judgment, to obscure the light of reason, and to sear the conscience.

When a mob is once raised, no one can tell where it will end, and all who assisted in raising it, are guilty of all the consequences.

The more respectable the persons engaged in it, and the more desirable the end to be obtained, the more dangerous is the example; for if good men may use unlawful means to accomplish a good end, how can wicked men be restrained from using like means for an unlawful end?

All good ends must be pursued by lawful means. The supremacy of the law is the only security for life, liberty, and property.

The defendants, who were convicted, were then sentenced to six months' imprisonment, and to pay a fine of fifty dollars and costs.

UNITED STATES v. PATRICK MURPHY.

The goods of the wife, are the goods of the husband, and must be so averred to be, in an indictment for larceny, although the wife kept a milliner's shop in Washington and the husband a tinman's shop in Alexandria, but the wife's shop was not for her separate use.

INDICTMENT for stealing the goods of Ann Hill.

It appeared in evidence that Ann Hill was a *feme covert*; that her husband kept a tinman's shop in Alexandria, and his wife a milliner's shop in Washington, but not for her separate use. They

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lived together, that is, he came to Washington three or four times a week.

The COURT (MORSELL, J., absent, and THRUSTON, J., doubting,) told the jury that in law the goods stolen were the goods of the husband, and ought to have been so stated in the indictment.

Verdict not guilty. The prisoner was remanded.

UNITED STATES *v.* LEWIS TARLTON.

The Act of Maryland of 1715, c. 26, § 2, which excludes the owner of stolen goods from being a witness for the prosecution in the county courts is not applicable to prosecutions for larceny in the Circuit Courts of the District of Columbia. This Court does not derive any part of its jurisdiction from the laws of Maryland which give jurisdiction to their courts. The jurisdiction of this Court is given by Act of Congress.

INDICTMENT FOR LARCENY. *Mr. W. L. Brent*, for the defendant, objected to the testimony of the owner of the stolen goods, because excluded by the Act of Maryland 1715, c. 26, § 2, which gives the county courts jurisdiction of "all thieving and stealing of any goods and chattels whatsoever, not being above the value of one thousand pounds of tobacco, (robbery, burglary, and house-breaking excepted,)" and to cause every person "legally convicted of any such thieving and stealing, except before excepted, by testimony of one sufficient evidence, not being the party grieved, before any such county court as aforesaid, by paying fourfold of the value of the goods so thieved or stolen as aforesaid, and the stolen goods returned to the party or parties grieved thereby, and by putting in the pillory and whipping," &c.

By the Act of 1785, c. 87, § 7, the jurisdiction of the county courts was extended to all criminal cases, unless particularly directed by law to be tried in the General Court.

But the COURT (MORSELL, J., absent,) overruled the objection; and CRANCH, C. J., said that this Court did not derive any part of its jurisdiction from the laws of Maryland which gave jurisdiction to the courts of that State. Our jurisdiction is given by the act of Congress. The Maryland Act of 1715 was applicable only to the county courts; it was a limitation of their powers only; it did not prevent the owner of the goods from being a witness in the provincial court.

UNITED STATES *v.* KURTZ, TARLTON, AND SPAULDING.

If a person, arrested for larceny, makes a confession, to the officer, as to that larceny, under a promise, by the officer, to do what he could for him if he would tell where

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the stolen goods were ; and afterwards, before the magistrate, without any new promise or threat or question, makes a confession of a different larceny ; such latter confession is admissible evidence against the party upon his trial for such latter larceny.

INDICTMENT for stealing "fifteen pieces of silver coin of the value of fifty cents each, and twenty pieces of silver coin of the value of twenty-five cents each, of the moneys, goods, and chattels of one Nicholas Callan."

A former indictment for the same theft had been quashed because the description of the property stolen was too vague. (*Ante*, 674.)

The defendant Spaulding having been arrested by two of the constables, Robinson and Jeffers, upon a charge of stealing the goods of one Singstack, was told by them that they could not discharge him ; and must take him before a magistrate, but that if he would tell them where the goods could be found, they would do what they could for him. The defendants were suspected also of having stolen Callan's money on a former day, but nothing was said by the constables to Spaulding about that theft of Callan's money, when they told him they would do what they could for him. Spaulding told Robinson where to find Singstack's goods, and they were found accordingly. Spaulding made other confessions to Robinson about Singstack's goods ; and afterwards, without any new promise, made confession before the justice, as to Callan's money.

In the trial of Spaulding for stealing Singstack's goods the COURT rejected his confession made under the promise of favor ; but in the trial of Spaulding and others, for stealing Callan's money, the COURT admitted his confession as to that theft ; there having been no promise as to that charge, nor any request that he would confess. The confession was not made to Robinson, but to the justice.

Verdict guilty. Sentenced to the penitentiary. Pardoned.

UNITED STATES v. REUBEN CRANDELL.

Upon an indictment for a seditious libel, it is not competent for the United States, for the purpose of proving the intent of the defendant in publishing the libel charged in the indictment, to give, in evidence, any papers subsequently published by the defendant, or found in his possession, unpublished by him, which would be libels, and might be substantive subjects of public prosecution, if published.

After having given evidence tending to prove a publication of the libel here, evidence may be given that other copies of the same libel were found in the possession of the defendant, with certain other papers or pamphlets, but not of the contents of such other papers or pamphlets, unless they have relation to the libels charged in the indictment, and would not, in themselves, be substantive ground of prosecution.

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Publication of pamphlets in New York is not evidence of their publication here, in Washington county, so as to fix upon the defendant here such a knowledge of their publication as to make his possession, alone, of other copies of the same, even with the words "read and circulate" written upon them, evidence of the publication of them, by him, here.

The United States cannot, in order to show the evil intent with which the defendant published the paper, give, in evidence, other unpublished papers or pamphlets, found in the defendant's possession, unless accompanied by evidence of some acknowledgment or admission, by the defendant, that he knew and approved their contents.

Upon the trial, on the plea of not guilty, the Court will not prevent the United States from giving evidence in support of a count which might be deemed insufficient, upon a motion in arrest of judgment.

The fact that certain papers were found in the possession of the defendant, may be given in evidence, although the papers may have been seized under an illegal warrant.

In a prosecution for a libel, the United States may give evidence to the jury that the defendant was found in possession of printed copies of the libel charged in the indictment, if some evidence has been given of the publication of the same libel, in this district.

Upon a count for publishing certain libellous pictures, the Court will not suffer the pamphlets to which they were attached to be read, in evidence, to the jury, to show the evil intent with which the defendant published the pictures, nothing but the pictures being charged as a libel in that count.

The counsel for the prosecution, in opening the argument, may read to the jury any part of the pamphlet given in evidence by the United States, which is pertinent to the issue, although not read in the opening of the evidence.

A mulatto, born of a white woman, is a competent witness against a Christian white person.

THIS was an indictment for publishing libels tending to excite sedition among the slaves and free colored persons in this district. It contained five counts.

1st. The first charged the defendant with publishing a libel containing, in one part thereof, these words: "Then we are not to meddle with the subject of slavery in any manner; neither by appeals to patriotism, by exhortations to humanity, by application of the truth to the conscience. Nor, even to propose, in Congress, that the seat of our republican government may be purified from this crying abomination, under penalty of a dissolution of the Union."

And in another part thereof, in an article entitled, "Reply to Mr. Gurley's letter, addressed to the Reverend R. R. Gurley, Secretary of the American Colonization Society, Washington city," signed by Arthur Tappan and others, the following words: "We will not insult your understanding, sir, with any labored attempt to prove to you that the descendants of African parents, born in this country, have as good a claim to a residence in it as the descendants of English, German, Danish, Scotch, or Irish parents. You will not attempt to prove that every native colored person you meet in the streets has not the same right to remain in this, his native land, that you and we have. Assuming this as an incontrovertible truth, we hold it self-evident that they have as good right to deport us to Europe, under pretext that there we

shall be prosperous and happy, as we have to deport them to Africa, on a similar plea."

And in another part thereof, in the said reply, the following words: "In what language could the unrighteous principles of denying freedom to colored people, in this country, (which amounts to the same thing as demanding the expulsion of those already free,) be more effectually, and yet more plausibly, inculcated, than in those very words of General Harper, you have, with so much approbation, quoted to us."

And in another part thereof, in the said reply, the following words: "Against this doctrine of suspending emancipation, upon the contingency or condition of expatriation, we feel bound to protest; because we believe that every man has a right to reside in his native country, if he chooses, and that every man's native country is the country in which he was born; that no man's right to freedom is suspended upon, or taken away by, his desire to remain in his native country; that to make a removal from one's own native country, a *sine quâ non* of setting him free, when held in involuntary bondage, is the climax of moral absurdity."

And in another part thereof, in another article entitled, "Three Months' Residence, or Seven Weeks on a Sugar Plantation, by Henry Whitby," containing the most disgusting and shocking details of cruel, inhuman, and immoral treatment of slaves, by the owners and overseers, and attorneys, or agents of proprietors, according to the tenor and effect following, that is to say: "On this and other occasions, I thought it my duty to acquaint the attorney with my observations and feelings in regard to the cruel floggings and severe treatment, generally, which I have witnessed at New Ground. He admitted the facts, but said that plantation work could not be carried on without the cart-whip. He moreover labored hard to convince me that the flogging did not injure the health of the negroes. I also told him of the exceeding immorality and licentiousness which I had witnessed, mentioning, in substance, the facts previously detailed. He replied that that was a thing which they must wink at." "If a man, in manner, so much the gentleman, and in other respects, so estimable, was necessarily led to countenance or wink at the enormities I have feebly attempted to describe, what, I ask, is to be expected from its subordinate administrators, who are continually exposed to the demoralizing influences of slavery? What, indeed, but the frightful wickedness and cruelty which are its actual fruits?" "In contempt of the laws, to the disturbance of the public peace, to the evil example of all others, and against the peace and government of the United States."

2d. The second count charges the publication of another libel,

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containing, among other things, the following words, namely : "Our plan of emancipation is simply this: to promulgate the doctrine of human rights in high places and low places, and in all places where there are human beings; to whisper it in chimney-corners, and to proclaim it from the house-tops, yea, from the mountain-tops; to pour it out, like water, from the pulpit and the press; to raise it up with all the force of the inner man, from infancy to gray hairs; to give line upon line, precept upon precept, till it forms one of the foundation principles and parts indestructible, of the public soul."

And in another part thereof, the following, namely : "I (meaning the said Crandell,) am not unaware that my remarks may be regarded, by many, as dangerous and exceptionable; that I may be regarded as a fanatic for quoting the language of eternal truth; and denounced as an incendiary for maintaining, in the spirit as well as the letter, the doctrines of American Independence. But if such are the consequences of a simple performance of duty, I shall not regard them. If my feeble appeal but reaches the hearts of any who are now slumbering in iniquity; if it shall have power given to it to shake down one stone from that foul temple where the blood of human victims is offered to the Moloch of slavery; if, under Providence, it can break one fetter from off the image of God, and enable one suffering African

' To feel
The weight of human misery less, and glide
Ungroaning to the tomb,'

I shall not have written in vain; my conscience will be satisfied. Far be it from me to cast new bitters into the gall and wormwood waters of sectional prejudice. No, I desire peace; the peace of universal love; of catholic sympathy; the peace of common interest; a common feeling, a common humanity. But so long as slavery is tolerated, no such peace can exist. Liberty and slavery cannot dwell in harmony together. There will be a perpetual war in the members of the political Mezentius; between the living and the dead. God and man have placed between them an everlasting barrier, an eternal separation. No matter under what law or compact their union is attempted, the ordination of Providence has forbidden it, and it cannot stand. Peace! There can be no peace between justice and oppression; between robbery and righteousness, truth and falsehood, freedom and slavery. The slaveholding States are not free. The name of liberty is there, but the spirit is wanting. They do not partake of its invaluable blessings. Wherever slavery exists to any considerable extent, with the exception of some recently-settled por-

tions of the country, and which have not yet felt, in a great degree, the baneful and deteriorating influences of slave labor, we hear, at this moment, the cry of suffering. We are told of grass-grown streets; of crumbling mansions; of beggared planters, and barren plantations; of fear from without, of terror within. The once fertile fields are wasted and tenantless, for the curse of slavery, the improvidence of that laborer whose hire has been kept back by fraud, has been there, poisoning the very earth beyond the reviving influence of the early and the latter rain. A moral mildew mingles with and blasts the economy of nature. It is as if the finger of the everlasting God had written upon the soil of the slaveholder, the language of his displeasure.

“Let, then, the slaveholding States consult their present interest, by beginning, without delay, the work of emancipation. If they fear not, and mock at, the fiery indignation of Him to whom vengeance belongeth, let temporal interests persuade them. They know, they must know, that the present state of things cannot continue. Mind is the same everywhere, no matter what may be the complexion of the frame which it animates. There is a love of liberty which the scourge cannot eradicate: a hatred of oppression which centuries of degradation cannot extinguish. The slave will become conscious, sooner or later, of his strength; his physical superiority; and will exert it. His torch will be at the threshold, and his knife at the throat of the planter. Horrible and indiscriminate will be the vengeance. Where, then, will be the pride, the beauty, and the chivalry of the South. The smoke of her torment will rise upward, like a thick cloud, visible over the whole earth.”

3d. The third count charged the defendant with publishing twelve other libels, in which were represented and exhibited “several disgusting prints and pictures of white men in the act of inflicting, with whips, cruel and inhuman beatings and stripes upon young and helpless and unresisting black children; and inflicting with other instruments, cruel and inhuman violence upon slaves, and in a manner not fit and proper to be seen and represented; calculated and intended to excite the good people of the United States, in said county, to violence against the holders of slaves in said county as aforesaid; and calculated and intended to excite the said slaves, in the said county, to violence and rebellion against their said masters, in said county, in contempt of the laws, to the disturbance of the public peace, to the evil example of all others, and against the peace and government of the United States.”

No evidence having been offered upon the fourth and fifth counts, they are omitted.

All these counts contained averments that, at the time of the publication of these libels, the citizens of the United States, residing in the county of Washington, in the District of Columbia, were lawfully authorized to hold slaves as property, and that many of them did so hold them; and that many free persons of color, also, reside in the district; and that the defendant unlawfully, maliciously, and seditiously contriving and intending to traduce, vilify, and bring into hatred and contempt, among the citizens of the United States, the laws and government of the United States, in the county of Washington, as duly established and in force, and to inflame and excite the people of the United States to resist, and oppose, and disregard the laws and government aforesaid, and the rights of proprietors of slaves in the said county, and to inflame and excite to violence against the said proprietors of the said slaves, not only the ignorant and ill-disposed among the free people of the United States, and the free persons of color in the said county, but also the slaves; and to produce among the said slaves and free persons of color, insubordination, violence, and rebellion, and to stir up war and insurrection between the said slaves and their said masters, published the said libels, containing, among other things, divers false, malicious, and seditious matters of and concerning the laws and government of the United States in the said district, and of and concerning the citizens of the United States holding slaves in the said district, and of and concerning the said slaves and free persons of color, and their labor, services, and treatment, and the state of slavery in the said district.

The defendant pleaded not guilty.

Upon the trial, *primâ facie* evidence of the publication by the defendant having been given, the Court permitted the pamphlet to be read to the jury, or as much thereof as either party might think proper to be read, and pertinent to the issue.

The District-Attorney, *Mr. Key*, in order to show the evil intent with which the defendant published the libel charged in the first count, offered to prove that the defendant had in his possession other libels of the same tendency.

Mr. Bradley and *Mr. R. S. Coxe*, for the defendant, objected, and cited 1 Russell, 242, and *Finnerty v. Tipper*, 2 Camp. 72.

Mr. Key, *contra*, cited *The King v. Amphlit*, 4 B. & A. 35.

The COURT was of opinion that the United States could not, for the purpose of proving the intent of the defendant in publishing the libel stated in the first count, give in evidence to the jury any papers subsequently published by the defendant, or found in his possession unpublished by him, which would be libels, and might be substantive subjects of public prosecution, if published.

Mr. Key then offered to prove the publication, by the defendant, of the libels stated in the first, second, and third counts, by proving the following facts, namely: That a large collection of libels, and among them several copies of those charged in those counts, with the words, "read and circulate" written thereon in his handwriting, were found upon the traverser; that he undertook to account for their being in his possession, and gave untrue and contradictory accounts; that he acknowledged that he had brought here those then shown to him, being the same now in court, and that they comprehended all he brought here except about a dozen; and that prior to the traverser's arrest sundry similar publications had been privately sent to various persons in this district by some unknown person or persons in the district. 1 Hawk. c. 73, § 13. "The having in one's custody a written copy of a libel, publicly known, is an evidence of the publication of it." *Rex v. Beere*, 1 Ld. Raym. 414; 3 Chitty Cr. Law, 871, 875; 1 Id. 568; *Malony v. Bartley*, 3 Camp. 210; 1 Russell, 235.

The counsel for the defendant objected, and cited Holt on Libels, 291; *The King v. Burdett*, 4 B. & A. 95; Starkie on Ev. part 4, pp. 849, 853; 1 Vent. 31; *Smith v. Wood*, 3 Camp. 323; 12 Vin. Ab. 227, Evidence, T. 661; *The King v. Fitton & Carr*, 2 Keb. 502.

THE COURT was of opinion that the Attorney of the United States may give evidence of the publication, in this district, of any copies of the libels charged in the first and second counts of the indictment. That if he shall have given any evidence tending to show such a publication here, he will be permitted to show that other copies of the same libels were found in the possession of the defendant. He may then give evidence that a certain number of papers or pamphlets were found in the possession of the defendant, together with the copies of the libels charged, and of the publication of which, in this district, he shall have given evidence; but he will not be permitted to give in evidence to the jury the contents of any of the papers other than those charged as libels in this indictment, unless such other papers have relation to the libels charged in the indictment, and would not, in themselves, be substantive ground of prosecution.

He may then give evidence to the jury of any confessions or acknowledgments made by the defendant in relation to any of the matters charged in the indictment. Starkie on Slander, 351, 352, and *Wyatt v. Gore*, Holt, N. P. Rep. 299.

The Attorney for the United States, having offered evidence to prove that the defendant was asked if he was aware of the nature of the pamphlets put into his hands in New York, and said he

supposed they were of the same nature as those he had been a subscriber for, and that he approved the sentiments they contained, offered in evidence to the jury the publications found on the defendant relating to the same subject with the libels charged in the indictment; and contended that they were competent to be given to the jury with evidence that some of them were indorsed in the defendant's handwriting with the words, "read and circulate," to prove, not only the evil intent of the defendant in publishing the libellous paper charged in the first count, but as evidence of the publication, by the defendant, of the paper charged as a libel in the second count.

He contended also that the pamphlets themselves purporting, upon their-title page, to be printed and published in New York, are evidence of their own publication, and that it is only necessary to prove a copy to have been found in the defendant's possession, with the words, "read and circulate" indorsed thereon by the defendant, to charge him with the publication of them here.

The COURT was of opinion that the printing and publishing of these pamphlets, in New York, is not evidence of their publication here, so as to fix upon the defendant here such a knowledge of their publication as to make his possession alone, even with the words "read and circulate" written upon them, evidence of the publication of them, by him, here.

That, in order to show the evil intent with which the defendant published the paper charged in the first count, it is not competent for the United States to give, in evidence to the jury, other unpublished papers or pamphlets, found in the defendant's possession, unless accompanied by evidence of some acknowledgment or admission by the defendant that he knew and approved their contents.

That the evidence did not appear to the Court to justify the inference that the defendant knew and approved the contents of those pamphlets, unless it can be connected with evidence that they were of the same nature with those which he had been a subscriber for.

The Attorney for the United States then gave evidence tending to show that the defendant had been a subscriber for the "Emancipator;" and the Court permitted the Attorney of the United States to give in evidence several numbers of that paper, as containing the sentiments alluded to by the defendant, as those which he approved, to show the evil intent with which he published the libel charged in the first count; but confined him to the reading of the sentiments contained in the "Emancipator" itself; and refused to permit him to read to the jury the publications advertised for sale by the secretary of the anti-slavery society, in the

Emancipator, although evidence had been given tending to prove that the defendant was a member of that society.

The Attorney of the United States then being about to offer evidence in support of the third count; the counsel of the defendant objected that the count was so vague, uncertain, and imperfect, that the Court ought not to permit evidence to be given in support of it; and the counsel on both sides agreed that the Court should now consider the question as if upon a motion to quash that count.

Mr. Key, for the United States, and in support of the indictment, cited the precedents in 2 Chitty, 45, 47, and 48.

The defendant's counsel cited 3 Chitty, 901, 903, and 904; 1 Russell, 210.

The COURT (*MORSELL, J., contra*,) permitted evidence to be given upon the third count, without prejudice to a motion in arrest of judgment upon that count, if the verdict should be against the defendant.

On the part of the defendant, it was then urged that the papers, found upon the defendant, had been illegally seized under pretence of an unlawful warrant commanding the officer, to whom it was directed, to arrest the defendant, and to search for and seize any incendiary pamphlets or papers which should be found in the defendant's possession, and bring them, with the defendant, before the justices who issued the warrant, and that therefore the pamphlets and papers so found are not admissible in evidence to the jury.

Upon that point the defendant's counsel cited *Entick v. Carrington*, 2 Wils. 219, 282, 291; State Trials, 1052, 1063; Lord Chief Justice Lee's Opinion; and the Statute of 7 & 8 Geo. 4, c. 29, § 63.

Mr. Key, for the United States, contended, that if the warrant was illegal, (which he did not admit,) yet the fact that the libels were found upon him, may be given in evidence, in the same manner as you may, upon an indictment for counterfeiting coin, prove that the defendant was found in possession of the instruments and implements of coining; or upon an indictment for burglary, give evidence of false keys, &c.

The COURT was of opinion that the seizure of the papers, even if illegal, cannot prevent the United States from giving, in evidence, the fact that the defendant had in his possession some of the libels charged in the indictment, and of the publication of which, in this district, evidence shall have been given.

The Attorney for the United States having offered evidence tending to show that the libel charged in the second count, and one of those charged in the third count, had been published in

this county, offered to prove that printed copies of the same were found in the possession of the defendant, at the time of his arrest, with the words "read and circulate," written by the defendant, upon some of them.

The counsel for the defendant, contended, that, if, in any case, the possession of a copy of a libel is evidence of a publication by the possessor, it must be a written copy of a known published libel. 1 Hawk. c. 73, § 13; 1 Vent. 31; *The King v. Fitton & Carr*, 2 Keb. 502; *Rex v. Beare*, 2 Salk. 418; S. C. Carth. 409; S. C. 1 Lord Raym. 414; *Want's case*, Moore, 627; 1 Russell, 235; *Barrow v. Lewellen*, Hob. 62; 2 Saunders on Pleading, 209; *Burdett's case*, 4 B. & A. 135; Stark. 419; 12 Vin. Ab. 239.

The Attorney of the United States, in reply, cited Starkie on Ev. part 4, pp. 849, 871, 875; 3 Chitty, 875 c; 1 Russell, 235; 12 Vin. Ab. tit. Evidence, T. b 61.

The COURT permitted the United States to give evidence to the jury, that the defendant was found in possession of printed copies of the libel charged in the second count, and of one of those charged in the third count; of the publication of which, in this district, some evidence had been given.

The Attorney for the United States then offered, in evidence, the pamphlets containing the pictures, which were charged as libellous, in the third count.

The COURT permitted the pictures to be given in evidence, and shown to the jury, but refused to suffer the pamphlets, attached to the pictures, to be read to the jury by the Attorney of the United States, as no part but the pictures was charged as libels in that count.

The Attorney of the United States then offered to read to the jury the pamphlets attached to the pictures, to show the evil intent with which the pictures were published.

The COURT said, that if the matter now proposed to be read, is not charged in the indictment, and would be, of itself, a substantive libel, and therefore indictable, it cannot be given in evidence.

The Attorney for the United States offered to examine, as a witness, one John Colclazer, a colored man, born of a white woman.

The counsel for the defendant objected.

But the COURT (THRUSTON, J., *contrà*,) overruled the objection, and the witness was sworn and examined.

The evidence being closed, *Mr. Carlisle*, who opened the argument to the jury, on behalf of the prosecution, was about to read some parts of the pamphlets containing the libellous matter charged in the indictment, which parts had not been read in the opening of the evidence.

The defendant's counsel objected to any thing being read in argument, to the jury, which had not been read when the pamphlets were offered in evidence.

But the COURT overruled the objection, and said that the United States had not only the right, but were bound to give, in evidence, the whole of the publication which contains the libelous matter charged; and either party has a right to read any part of it, pertinent to the issue.

Verdict, not guilty.

MARTHA MANNING v. FLORENTIUS COX.

The defendant's male slave, being, by consent of the plaintiff and defendant, at the plaintiff's house, upon a visit to his wife, who was the slave of the plaintiff, was taken suddenly ill of the smallpox, and, after being nursed three weeks by the plaintiff, died at her house. The defendant, as soon as he knew of the sickness of his slave, offered to remove him to his own house, but the plaintiff would not consent to the removal. Upon this evidence, the Court instructed the jury that the plaintiff could not recover.

THE plaintiff's original declaration contained three counts, namely,

1. *Indebitatus assumpsit* for \$100 for work, and labor, &c., in nursing the defendant's slave, at the defendant's request, while sick of the smallpox, at the plaintiff's house.

2. For money paid, laid out, and expended, at the defendant's request, for the like purpose.

3. *Insimul computassent*.

The plaintiff afterward filed an amended declaration, with four counts.

The first charged that the defendant's slave, being, by the order and direction of the defendant, on a visit at the plaintiff's house, was suddenly taken sick with the smallpox, and after lingering a long time, died at the plaintiff's house, and the plaintiff, during that time, nursed the said slave, &c.

2. That the plaintiff, at the special instance and request of the defendant, permitted the slave to visit and sojourn at the plaintiff's house, and while there, he was taken sick of the smallpox; and, after lingering a long time, died at the plaintiff's house; during which time the plaintiff nursed him, &c.

3. The third count stated, that, while the slave was visiting and being in the plaintiff's house, with the privity and consent of the defendant, he was suddenly taken sick, &c.

4. The fourth count stated that the defendant, as owner of the slave, "was bound, by law, to make all necessary provision for said slave, when he should be taken sick, and him to nurse and

attend, or procure to be nursed and attended." That, while the defendant's slave was at the plaintiff's house, he was taken so suddenly ill with smallpox that he could not leave the plaintiff's house without great danger to his life; of which disease he lingered a long time, to wit, six months, and then died; so that, during the whole time of his sickness, the plaintiff was "necessitated" to nurse and attend him, and administer diet to him to keep him from dying for want of attention. "And the plaintiff avers that the case of the said slave was so pressing, and of such a character, that she was compelled to render services without a previous application to, or employment of, the said defendant. Nevertheless, the said defendant has wholly neglected and failed to compensate the plaintiff for her services and trouble in that behalf rendered, as he was bound to do, by law. Of all which matters the defendant had notice, &c. By means of which said several premises, the plaintiff hath sustained great loss by being compelled to send her children out of her house, &c., &c."

The evidence was, that the wife of the defendant's slave, was the slave of the plaintiff, and that he was permitted from time to time, to visit his wife, with the consent of the plaintiff and defendant. That on one of these visits, he was taken sick, and after lingering three weeks, died at the plaintiff's house. That the defendant, as soon as he heard of his slave's illness, offered to remove him to his own house, but the defendant would not consent to it.

Mr. R. J. Brent, for the plaintiff, contended that an action will lie upon any breach of duty by the defendant; and that it was his duty to compensate the plaintiff for her services and trouble in nursing the defendant's slave. 1 Saund. on Pleading, 337, 338, 413; 1 Evans's Harris, Ent.; 1 Wheat. Selw. 36.

Mr. Z. C. Lee, for the defendant, prayed the Court to instruct the jury, that the evidence did not support the declaration.

And the COURT (CRANCH, C. J., *contrà*,) gave the instruction as prayed.

MORSELL, J., observing that if the whole evidence was believed by the jury, the plaintiff was not entitled to recover.

CRANCH, C. J., said, that to support the plaintiff's action upon this declaration, she must satisfy the jury that there was a duty on the part of the defendant to be violated by not compensating the plaintiff for the services stated in the declaration. But there was no such duty, unless the services were performed at the request of the defendant, either express or implied; and that if they were rendered upon a sudden emergency, and were beneficial to the defendant, his assent might be presumed, unless the contrary appeared in evidence.

BELTZHOOVER & Co. v. STOCKTON & STOKES.

In an action on the case, for negligence of the defendants' driver in running against the plaintiffs' stage-coach, the plaintiffs' driver is not a competent witness for the plaintiffs, without their release.

A release, under the seal of one of the copartners, is a sufficient release of a joint right of action.

ACTION on the case, for negligence of the defendants' driver in running against the plaintiffs' stage-coach.

The driver of the plaintiffs' stage-coach was called as a witness for the plaintiffs.

Mr. Key, for the defendant, objected that he was interested, because it is yet to be ascertained which driver was in fault; and if it was the fault of the witness, the plaintiffs have a right of action against him for his negligence.

But the COURT (THRUSTON, J., not sitting,) overruled the objection, and suffered the witness to be sworn and examined.

On the next day, however, (May 20, 1836,) the jury having been adjourned over,

Mr. Key, for the defendant, to show that the witness was incompetent, without a release from the plaintiffs, cited *Starkie*, part 4, p. 1732, note d, and the cases there referred to.

Mr. Lee, contra. *Starkie*, part 4, p. 747, 1728; *Case v. Reeve*, 14 Johns. 82.

The COURT was satisfied that they had erred in admitting the witness, without a release, to testify upon the point of negligence.

Mr. Bradley, for the plaintiff, then offered a parol release, signed in the name of Beltzhoover & Company, by John Brown, one of the firm, without a seal; and cited *Bulkley v. Dayton*, 14 Johns. 387.

The COURT said it is not a technical release, and was not sufficient to restore the competency of the witness.

Mr. Bradley then offered a release under the seal of the said John Brown, releasing all right of action of the firm against the witness in relation to the transaction.

Mr. Key, contra. The authority in 14 Johnson, 387, only decides that one partner may release the debts of the firm; not unliquidated damages.

Mr. Bradley, in reply. One partner has power to release all the rights of the firm. Gow on Partnership, 76, 77; *Starkie*, part 4, p. 758, note.

The COURT was of opinion, that the release under the seal of one of the firm, stating himself to be a partner, is a sufficient release.

The COURT said that the witness (who had been examined yesterday, without a release,) must be examined again, unless the defendants should waive the new examination ; which they did.

ROBERT MARSHALL v. AMELIA T. DORSETT.

Under the Act of Maryland, 1798, c. 101, cl. 5, § 8, the husband is the administrator of his deceased wife, and may sue for her choses in action not reduced to possession in her lifetime ; although her property had been conveyed, in her lifetime, to a trustee, for the sole and separate use and benefit of her, and her executors, administrators, and assigns ; she not having assigned the trust-fund in her lifetime, nor disposed of it by will or deed executed according to the terms of the trust.

ASSUMPSIT for money had and received by the defendant to the plaintiff's use.

By a deed of trust, the property of the plaintiff and his wife was conveyed to Mrs. Susan G. Beall, in trust for the sole and separate use of the plaintiff's wife, Anne Marshall, her executors, administrators, and assigns.

The trustee, with Mrs. Marshall's consent, lent \$400 to the defendant, and took her note therefor, payable twelve months after date, to the said " Susan G. Beall, trustee for Anne Marshall, with interest in advance, for value received ; " dated September 18, 1832. The wife died, and this suit was brought by the husband in his own name, who, by the Maryland Act of 1798, c. 101, cl. 5, § 8, is entitled to all the rights of administrator to his deceased wife, and may sue for and recover her choses in action, not reduced into possession during the coverture.

The COURT (*nem. con.*) decided, that the husband, standing in the place of administrator, had a right to recover this debt, the wife not having, in her lifetime, disposed of the trust-fund by last will or deed executed according to the terms of the trust.

Mr. R. S. Coxe, for the plaintiff.

Messrs. Brent and Brent, for the defendant.

Verdict for the plaintiff, \$430.

SAMUEL CHEW v. J. W. BAKER'S ADMINISTRATORS.

If there be two counts in a declaration, and the statute of limitations be pleaded to both ; it is not necessary that it should be supported as to both ; but it may be supported as to both or either.

An account in bar, which consists of debits only, against the plaintiff, does not take the plaintiff's cause of action out of the statute of limitations, although the last item of debit be within the three years.

If a sub-contractor agreed with the original contractor to do a certain part of the work and to receive his pay at the time the contractor receives his pay, and in like proportions, and the contractor is to receive four fifths of every monthly estimate, at the end of each month, and the remaining one fifth when the work shall be completed, and the final estimate made, the sub-contractor's cause of action against the contractor does not accrue until the plaintiff has notice that the money has been received by the defendant, or has demanded it of the defendant.

The moneys, thus received monthly by the contractor, are to be considered as received by him, on account; and if the final settlement of the account is made within the three years, the statute of limitations is no bar to the sub-contractor's action against the contractor, although the moneys, so received by him, on account, should have been received by him more than three years before action brought.

ASSUMPSIT. First count for work and labor. Second count for money had and received. Pleas, *non assumpsit*, and the statute of limitations. The defendant also filed an account in bar, consisting of sundry items of payments made to the plaintiff, by the defendant. This suit was commenced on the 13th of November, 1834.

Mr. R. S. Coxe, for the plaintiff, contended, that, as the statute of limitations was pleaded generally, it must be good as to both counts, or it was not good as to either. *Webb v. Martin*, 1 Lev. 48.

But the COURT (*nem. con.*) was of opinion that it is not necessary that the plea of limitations should be supported as to both counts, but that it might be supported as to both or either.

Mr. Marbury, for the plaintiff, then contended, that, as the last item of the account in bar was a payment made by the defendant to the plaintiff, within the three years, it is an acknowledgment of a subsisting debt, and a promise to pay the balance. *Catling v. Skoulding*, 6 T. R. 189; 2 Saund. 127, note; *Whetmore v. Smith*, 6 Wheeler, Amer. Com. Law, 472.

The COURT (*nem. con.*) said that the account in bar, as it is called, (being only a statement of debits against the plaintiff,) did not take the case out of the statute, although the last item was within the three years.

Mr. Key, for the defendant, then contended that the plaintiff's cause of action accrued monthly, as the payments were to be made monthly, as the defendant received money from the Chesapeake and Ohio Canal Company, upon the monthly estimates of his work by the engineer; and three years had expired after the monthly estimates, and after the defendant had received the money, before the suit was brought. And he prayed the Court to instruct the jury, that if they believe from the evidence, that prior to the 10th of August, 1831, all the money due for the work on section B, (which was the work for which this action was brought,) had been received by the defendant's intestate, except the balance appearing on the final estimate, then the plaintiff is

Carothers v. Chesapeake and Ohio Canal Company.

barred of all his claim except such proportion of the said balance as the work done by the plaintiff bears to the whole amount of work stated in the said estimate.

Which instruction the COURT (*nem. con.*) refused to give; CRANCH, C. J., and MORSELL, J., being of opinion, that, as by the agreement, Baker was to receive the money for the plaintiff, the statute of limitations did not begin to run against him until he had notice of the receipt of the money, or had demanded it.

The COURT, at the prayer of the plaintiff's counsel, instructed the jury, in effect, that if the final settlement between the defendant's intestate and the Canal Company was not made before the 28th of January, 1832, the plaintiff's cause of action, for his share of the one fifth retained, did not accrue before that day; and that the payments made from time to time, by the company, to the defendant's intestate, were to be considered as payments made on account; and that if the final settlement was made on the 28th of January, 1832, and not before, and that the amount was paid on that day, the plea of limitations is no bar to the plaintiff's action, which was commenced on the 13th of November, 1834.

Verdict for plaintiff, \$2,404.81, with interest from the 28th of January, 1832.

JOHN CAROTHERS v. CHESAPEAKE AND OHIO CANAL COMPANY.

Under the contract between the plaintiff and the defendant, the final estimate of the engineer, of the amount and value of the work done by the plaintiff, was to be conclusive, unless objected to within twenty days.

The plaintiff, within the twenty days, objected to the estimate of the price, but not of the quantity of the work.

He cannot, after the twenty days, object to the estimate of the quantity of the work done. It is conclusive between the parties.

ASSUMPSIT, for work and labor upon the canal.

A final estimate was made by Rodier, an engineer, and objected to by the plaintiff, within the twenty days allowed by the contract; but his objection was only to the price, not to the quantity, of the excavation. The board of directors, according to the terms of the contract, referred the estimate to Cruger, another engineer, who confirmed the estimate of Rodier. The plaintiff now complains that the quantity of excavation allowed is too small, as well as the price, and has brought his action for the difference, which he claims, both as to price and quantity.

Mr. Brent, for the plaintiff, contended that the decision of Cruger is not binding on the plaintiff, because he had not notice to attend the engineer, who was to be considered as an arbitrator, and whose award has been given *ex parte*.

But the COURT overruled the objection; being of opinion that the plaintiff is, by his contract, bound by the decision of Cruger.

The COURT was also of opinion that the final estimate was equally conclusive as to extra work.

SAMUEL HEINECKE v. RAWLINGS & LANGDON.

A stranger to the indenture of apprenticeship cannot take advantage of the omission to insert the age of the apprentice.

CASE for enticing and harboring the plaintiff's apprentice.

The plaintiff offers, in evidence, the indenture, under seal of Joseph R. White, the apprentice, Ambrose White, his father, and the plaintiff, by which the apprentice, with the consent of his father, binds himself, as apprentice, to the plaintiff, to learn the art and mystery of a tailor, for three years, from the 2d of January, 1833.

Mr. Brent, for the defendant, objected that the age of the apprentice is not stated in the indenture, nor does it appear thereby, that he was a minor, as required by the 4th section of the Maryland Act of 1793, c. 45. *Ballard v. Edmondston*, (2 Cranch, C. C. 419.)

Mr. Bradley and *Mr. Lee*, for the plaintiff, cited the 7th section of the same act, which provides, that, "in case the contract, whether defective in form or not, hath been partly executed," "the master or mistress of any apprentice may detain the said apprentice in his or her service till such apprentice is or shall be discharged by the court aforesaid; and the said master or mistress may maintain such action against strangers, as if such apprentice had been legally bound to serve."

Mr. Brent, in reply, contended that this indenture was not defective in form only, but in substance, and that therefore the 7th section of the act was not applicable to the case.

The COURT (*nem. con.*) was of opinion, that the objection to the validity of the indenture, because the age was not inserted therein, cannot be made by a stranger. As to him, the indenture is, under the 7th section of the statute, valid until set aside by the Court under the provisions of the same statute.

Verdict for the plaintiff, \$16.

ALLEN P. BOWIE v. ALEXANDER HUNTER, Marshal, D. C.

To prove that the bill of sale of a slave by a mother to her son was fraudulent as to her creditors, her declarations, prior to the date of the deed, were permitted to be given in evidence.

REPLEVIN, for a slave named Mahala.

The defendant, the marshal of the District of Columbia, had

 Nicholls v. Wright.

taken the slave by virtue of a *fi fa.* against one Elizabeth Beale, the mother of the plaintiff.

The plaintiff claimed the slave under a bill of sale made by her to him, on the 22d of October, 1831, acknowledged and recorded the same day.

Mr. Bradley, for the defendant, contended that the bill of sale was fraudulent as to Mrs. Beale's creditors, and offered evidence to prove, that shortly before the execution of the bill of sale, she declared she would convey away all her property, so that the creditor, who had obtained judgment against her, should never recover his debt.

Mr. Brent & Son, for the plaintiff, objected that her declarations could not be given in evidence against her vendee, the plaintiff.

But the COURT (CRANCH, C. J., *contrà*,) permitted the evidence to be given. The reason stated by MORSELL, J., was, that, perhaps, a knowledge of such declarations may, by the evidence, be brought home to the plaintiff.

Mr. Brent moved for a new trial, and cited 5 Binney, 109; 3 Wheeler, 260.

But the COURT refused to grant it.

W. S. NICHOLLS v. THOMAS C. WRIGHT.

It is usury to take two and a half per cent. commission, besides the usual bank discount on a draft at forty-five days to renew a like draft which had been discounted by the plaintiff at the same rate, and which had been drawn to raise money upon, and had become payable to the plaintiff.

The drawer of an inland bill of exchange, is not a competent witness in an action against the acceptor, to prove that it was given for an usurious consideration.

ASSUMPSIT against the acceptor of a draft for \$200, dated January 11, 1834, payable forty-five days after date, drawn by Richard Wright, payable to his own order, and by him indorsed, in blank. Defence, usury.

Mr. Redin, for the defendant, offered to examine Richard Wright, the drawer and indorser of the draft, to prove the usury; and cited *Gaither v. Lee*, in this Court, at June term, 1820, (2 Cranch, C. C. 205.)

Messrs. Key and Dunlop, for the plaintiff, objected that a party to an instrument, cannot be a witness to invalidate it. The Supreme Court of the United States in the *Bank of the United States v. Dunn*, 6 Peters, 51, overruled the doctrine of *Jordaine v. Lashbook*, 7 T. R. 601, and set up that of *Walton v. Shelley*, 1 Id. 296.

Ingram v. Butt.

The COURT (THRUSTON, J., absent,) rejected the witness, upon the authority of the *Bank of the United States v. Dunn*.

The evidence was, that this draft was given to take up a like draft at sixty days, which had been drawn and indorsed by the said Richard Wright, and accepted by the defendant to raise money upon, and which the plaintiff had discounted, by retaining the usual bank discount for sixty-four days, and a commission of two and a half per cent., and paying to R. Wright \$192.87. When that draft became payable, the plaintiff agreed to discount this new draft at forty-five days, upon the same terms, namely, the usual bank discount, and a commission of two and a half per cent., and refused to allow more favorable terms; the drawer agreed to them, and it was accordingly discounted by the plaintiff on those terms.

The COURT, (THRUSTON, J., absent,) on the prayer of the defendant's counsel, instructed the jury, in effect, that if they found the facts to be so, the transaction was usurious, and the plaintiff could not recover thereupon.

Verdict for the defendant.

WASHINGTON INGRAM v. RICHARD BUTT.

In an action of false imprisonment against the Superintendent of the Washington Asylum, he may plead the general issue, and give in evidence his justification under a warrant from a justice of the peace.

THIS was an action of assault and battery, and false imprisonment, against the Superintendent of the Washington Asylum.

Mr. Bradley, for the defendant, offered to give evidence in justification, under a warrant from a justice of the peace; under the English statute of 7 Jac. 1, c. 5, made perpetual by 21 Jac. c. 12, § 2; and also under the English statute of 21 Jac. c. 12, § 5, which statutes, in this particular, were in force in Maryland, and adopted by the Act of Congress of the 27th of February, 1801, [2 Stat. at Large, 103,] concerning the District of Columbia. (See *Kilty's Report upon the English Statutes*, 236.)

Mr. Dermott, contra.

The COURT (MORSELL, J., doubting,) permitted the evidence to be given.

The plaintiff became nonsuit.

BENJAMIN BURNS v. GEORGE SEMMES.

In an action upon a letter of guaranty, the plaintiff must show that he gave notice in a reasonable time, to the defendant, of his acceptance of the guaranty, and of the value of the articles furnished.

The Court will not give an instruction not warranted by the evidence.

Although the person in whose favor the letter of guaranty is given, has passed to the credit of the defendant, in account, the value of the goods obtained upon the guaranty, and that account has been settled, yet the plaintiff cannot recover upon the count for money had and received.

THIS was an action upon the following letter of guaranty :

“23d December, 1829.

“Dear Sir: The bearer, Mr. Edward Tolson, informs me that he is unacquainted with you, and wishes to get a suit of clothes, to be paid for next April.

“If you will furnish him therewith, I will guaranty payment for them. Yours respectfully,

George Semmes.

“To Benjamin Burns, Esq., merchant-tailor, Washington, District of Columbia.”

On the trial, the defendant's counsel, *Mr. R. J. Brent*, objected that there was no evidence of notice to the defendant, that the guaranty would be accepted; nor that it had been accepted; nor of the amount or value of the clothes furnished. The letter is only an offer to guaranty the payment, if the plaintiff should furnish the clothes. *Norton v. Eastman*, 5 Amer. Com. Law, 529; *Babcock v. Bryant*, 12 Pickering, 133; *Crewer v. Higginson*, 1 Mason, 324; *Norton v. Eastman*, 4 Greenleaf, 522; *Rapalye v. Bailey*, 3 Connect. 438; *Duval v. Trask*, 12 Mass. 154; *Green v. Dodge*, Ohio Cond. Rep. 436; *Douglas v. Reynolds*, 7 Peters, 113; *Canton v. Shaw*, 2 Har. & Gill. 22; *Kounslaer v. Clarke*, in this Court.

Mr. Bradley, contra. It is an original undertaking to pay; not a promise to pay if the other should not. 5 Amer. Com. Law, 530; *Douglass v. Reynolds*, 7 Peters, 113; *Grice v. Ricks*, 3 Devereaux, S. C. Rep. 62; *Mason v. Lawrason*, 3 Cranch, 492.

If it is a sufficient guaranty, and if the declaration avers that the goods were furnished upon the faith of the guaranty, notice is not necessary. *Warrington v. Furber*, 8 East, 242; *Swinyard v. Bowes*, 5 M. & S. 62; *Fell on Guaranty*; *Allen v. Rightmere*, 20 Johnson, 365.

The COURT (*THRUSTON, J., contra*,) at the prayer of the defendant's counsel, instructed the jury that the plaintiff cannot recover in this case, unless he satisfies the jury by evidence, that the plaintiff gave notice to the defendant, in a reasonable time, of his acceptance of the guaranty, and of the value of the clothes furnished.

Mr. Bradley, for the plaintiff, then prayed the Court to instruct the jury in effect, that if they should be satisfied by the evidence, that the goods were originally furnished to Mr. Tolson, upon the credit and at the request of the defendant, it is an original undertaking by the defendant, under the count for goods sold and delivered by the plaintiff to the defendant at his request.

But the COURT (CRANCH, C. J. doubting,) refused to give this instruction, because there was no evidence of any contract between the plaintiff and the defendant, other than the letter of guaranty.

Mr. Bradley, then prayed the Court to instruct the jury, in effect, that if the defendant was, at the time of giving the letter of guaranty, indebted to Tolson in a larger sum than the value of the clothes, and that it was agreed between them that Tolson should give the defendant credit in their account, for the value of the clothes, and that credit was so given, and that the account between Tolson and the defendant has been settled, the plaintiff may recover upon the count for money had and received.

But the COURT refused to give the instruction.

Verdict for the plaintiff for \$65, with interest from the 1st of May 1831.

The defendant moved for a new trial on the ground that the verdict was against the evidence, and the instruction of the Court upon the point of want of notice.

But the Court overruled the motion.

UNITED STATES v. ANDREW M. LAUB.

If there is any evidence in support of a credit claimed by the defendant, the Court will not instruct the jury that the defendant is not entitled to such credit.

A transcript from the books of the Treasury of the United States charging the balance of a former settlement, is not, *per se*, evidence upon which the jury can find a verdict for the United States for such balance.

If a public disbursing officer has lost his vouchers without fault on his part, and he has produced the best secondary and presumptive evidence in his power, it is for the jury to find whether he has faithfully disbursed the public money which came to his hands.

If a document be read by the defendant, by consent, containing a statement of the defendant's conversations, the Court will not instruct the jury that such conversations are not evidence of the facts therein stated.

ASSUMPSIT, to account for public money received by the defendant for certain purposes.

The United States claimed a balance of \$11,855.86, unaccounted for. The defendant claimed credits for certain items to the same amount.

United States v. Jeffers.

By the burning of the Treasury offices all his vouchers were destroyed ; he being an officer in the Treasury Department, and having left his vouchers in his desk on the 31st March, 1833, the night of the fire.

The defendant having offered some evidence in support of his claim for certain items of credit,

Mr. Key, for the United States, prayed the Court to instruct the jury that the defendant was not entitled to credit for those items ; which instruction the COURT (*THRUSTON, J., contra*,) refused to give.

The COURT (*THRUSTON, J., contra*,) instructed the jury, at the prayer of *Mr. Cox*, the defendant's counsel, that the account from the Treasury Department upon which a balance appears against the defendant of \$7,769.25, is not, *per se*, evidence upon which the jury can find a verdict against the defendant for the items in the same which appear to be balances on former settlements.

And further, (*THRUSTON, J., contra*,) instructed the jury that if from the evidence, they should believe that the defendant had faithfully paid over, for public purposes and within the sphere of his official duty, all the public money which came to his hands, then the plaintiff is not entitled to recover.

The defendant's counsel, with the consent of the Attorney of the United States, having read certain parts of a public document, No. 22, containing certain affidavits taken by order of the President, in relation to the burning of the Treasury offices, and stating conversations between the defendant and *Mr. Ashbury Dickens* and *Mr. McLane* ; and after other evidence had been given by the defendant ; prayed the Court to instruct the jury that the conversations of the defendant with *Mr. Dickens* and *Mr. McLane*, read from that executive document by the defendant's counsel, are not evidence to the jury of the facts stated by the said defendant in the said conversations.

Which instruction, the COURT (*THRUSTON, J., contra*,) refused to give.

Verdict for the defendant.

Affirmed by the Supreme Court of the United States. 12 Peters, 1.

UNITED STATES v. MADISON JEFFERS.

It is a breach of diplomatic privilege, by an officer of justice, to enter the dwelling-house of a secretary of legation and seize there a runaway slave ; for which the officer will be removed from office.

FRANCIS S. KEY, Esq., Attorney of the United States for the

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District of Columbia, having laid before the Court a letter to him from the Secretary of State, in these words: "F. S. Key, Esq., United States Attorney for the District of Columbia. Department of State, Washington, May 27, 1836. Sir, I transmit a copy of a communication from His Britannic Majesty's Envoy Extraordinary and Minister Plenipotentiary, Mr. Fox, dated yesterday, complaining of the conduct of a constable named Jeffers, at the house of one of the members of His Majesty's mission.

"You are requested to inquire immediately into the case and to ascertain and report to the department, under what authority the constable acted; with what process he was charged; by whom the process was issued, and on whose application; and generally what proceedings have taken place in the matter.

"You will also be pleased to inform me, to whom the constable is amenable, and in what manner he is removable for misconduct.

"I am, Sir, your ob't. servant, John Forsyth."

And a copy of the communication from His Britannic Majesty's Envoy Extraordinary, therein referred to, in these words:

"The undersigned, His Britannic Majesty's Envoy Extraordinary and Minister Plenipotentiary, feels it his duty to bring the following case, involving a breach of the privilege of the diplomatic body, under the immediate consideration of Mr. Forsyth, Secretary of State of the United States.

"A colored lad, serving for hire in the family of Mr. Bankhead, His Britannic Majesty's Secretary of Legation, was this morning taken away from the house of that gentleman by a constable of the name of Jeffers, belonging to the capitol ward of this city, upon the plea of conveying him to his master, Mr. King, from Alabama. No previous intimation of a wish to remove the lad from Mr. Bankhead's service had been given to him either by Mr. King or by any one else. Mr. Bankhead, in order to avoid any disturbance, allowed the servant to be removed, but formally protested against the proceeding; and the undersigned now submits the case to the consideration of Mr. Forsyth, in the confident expectation that immediate redress will be granted by the government of the United States for this act of authority exercised by a constable of the district, in the house of one of the members of His Britannic Majesty's mission, in violation of the privileges of the diplomatic body.

"The undersigned has the honor to renew to Mr. Forsyth the assurances of his distinguished consideration. H. S. Fox.

"Washington, May 26th, 1836.

"The Honorable John Forsyth, &c. &c. &c."

It is, on the motion of the said Attorney of the United States, ordered, that the said Madison Jeffers, in the said communication mentioned, be removed from the office of constable of the county

of Washington, unless he show cause to the contrary on the thirty-first day of May instant, provided a copy of this order shall have been served upon him this day.

“By order of the Court, May 30th, 1836.

“Test: William Brent, Clerk.”

The rule having been duly served, the said Madison Jeffers appeared on the 31st of May and, by way of showing cause, filed his affidavit admitting the facts, but alleging his ignorance of the diplomatic privileges, and his belief that he was executing his duty lawfully, in arresting a fugitive slave, and disclaiming all intentional disrespect to Mr. Bankhead.

His counsel, *Mr. W. L. Brent*, contended that Jeffers, as the agent of the owner of the slave, had a right to take him anywhere; and also that, as a constable, he had a right to take up a runaway. That the diplomatic privilege extends only to foreign ministers, and upon certain terms; and not to servants of a secretary of legation.

That the servant had not been registered according to the Act of Congress of 30th of April, 1790, § 26, [1 Stat. at Large, 112,] and therefore Jeffers had a right to arrest him; because the Act of Congress for punishing the violation of privilege does not extend to those who may arrest a servant not registered. By not registering his servant the minister has waived his privilege. *Seacombe v. Bowlney*, 1 Wils. 20.

The COURT stopped *Mr. Key* in reply.

THRUSTON, J., said he wished no further time or argument. He was of opinion that Jeffers should be dismissed from office.

MORSELL, J., concurred.

CRANCH, C. J., would have taken time to consider; but said that his present opinion coincided with that of the Court.

Whereupon the COURT passed the following order.

Madison Jeffers, upon whom a rule was laid on the 30th of May last, to show cause why he should not be removed from the office of constable for the county of Washington, upon the grounds therein stated, appeared and filed his affidavit, and the same was read and heard, and he was further heard by his counsel. Whereupon

It is considered by the COURT, that the said Madison Jeffers was guilty of a violation of the privileges of His Britannic Majesty's Envoy Extraordinary and Minister Plenipotentiary, as stated in his letter to the Secretary of State, referred to in the said rule; and the said Madison Jeffers, having shown no sufficient cause to the contrary, it is thereupon considered by the Court, this 7th day of June, 1836, that the said Madison Jeffers be, and he is hereby, removed from his said office of constable for the county aforesaid.

THOMAS BAKER v. JEFFERS & GIDEON.

If the landlord evict the tenant from part of the premises, he cannot distrain for the rent. If he is entitled to an apportionment of the rent he may maintain an action for use and occupation; but if he is not entitled to an apportionment of the rent, he has no remedy.

REPLEVIN. Cognizance as bailiffs of Mrs. McGunnigle for rent-arrear; plea; an eviction by the landlady of a ten pin alley.

Mr. R. J. Brent, for the plaintiff, prayed the Court to instruct the jury, in effect, that an eviction from a part of the premises suspends the payment of the rent. 1 Tuck. Com. 27; 1 Saund. 204, n. 7.

The COURT (THRUSTON, J., absent,) instructed the jury that if they should be satisfied by the evidence that the landlady, Mrs. McGunnigle, evicted the plaintiff from a part of the demised premises, she cannot recover in this action; because, if, at the time of the distress she was only entitled to an apportionment of the rent, and not to the whole rent, she had no right to distrain, but must resort to her action for use and occupation; and if it was not a case in which she was entitled to an apportionment, she cannot recover in any form of action.

Verdict for the plaintiff and \$50 damages.

UNITED STATES v. AZARIAH COOLY.

An indictment, under the Penitentiary Act for the District of Columbia, for keeping a faro-table, must charge the offence either to be the keeping of a common gaming-table, or must positively charge it to be the keeping of a faro-bank; not "a gaming-table called a faro-bank."

THE indictment charged that the defendant "on the first day of April, 1835, with force and arms, at the county aforesaid, did keep a certain gaming-table called a faro-bank, against the form of the statute," &c.

Mr. Dandridge, for the defendant, moved the Court to quash the indictment, because it was too uncertain, and did not describe the offence stated in the statute.

The first section of the Penitentiary Act of the 2d of March, 1831, enacts that every person, who shall be convicted, in any court in the District of Columbia, of any of the offences enumerated, and, among others, of the offence "of keeping a faro-bank or other common gaming-table," shall be sentenced to suffer punishment by imprisonment and labor for the time and times therein

after described, in the penitentiary of the District of Columbia. And by the twelfth section it is enacted, that every person duly convicted "of keeping a faro-bank or gaming-table, shall be sentenced to suffer imprisonment and labor for a period not less than one year, nor more than five years."

Thus, the first section refers to the twelfth to ascertain the duration of the punishment of the offence described in the first. The first describes the offence; the twelfth limits the time of imprisonment and labor.

In *Henry Smith's case*, at November term, 1835, [*ante*, 629,] this Court decided that the first section describes the offence, and the twelfth ascertains the duration of the punishment, and that both sections must be construed together; and that the punishment mentioned in the twelfth is to be applied to the offence described in the first.

The offence described in the first section is the keeping of a "faro-bank or other common gaming-table."

The indictment does not charge the keeping of a common gaming-table, nor of keeping a faro-bank; but of keeping "a gaming-table called a faro-bank."

All the circumstances named in the statute as constituting the offence must be stated in the indictment. It is not sufficient to charge it as *contra formam statuti*. 1 Chitty, 282; *Craven's case*, Russ. & Ryan, 14, where, in an indictment upon the statute against stealing bank-notes, the offence charged was stealing a certain note commonly called a bank-note; and it was held to be insufficient, and was quashed.

Mr. Key, contra. The twelfth section does not require the word "common;" and the Court would instruct the jury, upon a count omitting the word "common," that they must be satisfied by the evidence that it was a common gaming-table.

The indictment charges the defendant with keeping a faro-bank, which is clearly within the statute. A thing is what it is commonly called. To say that the defendant kept a gaming-table called a faro-bank, is to say that he kept a faro-bank.

It is not necessary to use other words than those of the statute. *Commonwealth v. Arnold*, 4 Pick. 251; *Brown v. Commonwealth*, 8 Mass. Rep. 59; *The People v. Holbrook*, 13 Johns. 90; *United States v. Bachelder*, 2 Gall. 18; S. C. 6 Wheeler, 34.

If there are two statutes *in pari materia*, it is sufficient to take the words of either. So of two sections in the same statute.

Mr. Dandridge, in reply, cited *United States v. Bachelder*, 6 Wheeler, 35.

The COURT (*nem con.*) quashed the indictment, being of opinion that the indictment must charge the offence either to be the keep-

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ing of a common gaming-table, or must positively charge it to be the keeping of a faro-bank, not merely a gaming-table called a faro-bank.

THRUSTON, J., suggested that it would be better to charge it as the keeping of a faro-bank, the same being a common gaming-table. In a subsequent case against *McCormick*, at this term, for keeping "a certain public gaming-table called a faro-bank," the indictment was quashed, on the authority of *Cooly's case*.

GRIFFIN AND TILLEY v. T. WOODWARD, Bailiff of Cooper.

A negotiable note given by the tenant to his landlord, which, when paid, was to be received "on account of rent," is no bar to a distress for the whole rent due before the note became payable, although discounted for the landlord and the proceeds received by him upon his indorsement of the note to a bank.

REPLEVIN. Cognizance, as bailiff of William Cooper, for rent-arrear. Plea, no rent-arrear, and issue.

Upon the trial the plaintiffs, having offered evidence that they had given their note to the landlord at sixty days, payable on the 16th of December, 1834, which when paid was to be "on account of rent;" and that the note was discounted at the Bank of the United States to the credit of the landlord, and that the distress was made on the 10th of December, 1834, before the note had become payable; the sum of \$266 of rent having become due on the 20th of November, 1834; and that, when the defendant came to levy the distress, one of the plaintiffs offered to pay the balance of rent, after deducting the amount of the note; but the defendant refused to receive it, on the ground that he had no authority from the landlord therefor.

The defendant then offered evidence to prove that the rent for which the note was given was due at the time the note was given; that the note was regularly protested by the bank, and was afterwards taken up at the bank by the landlord, and which he produced in his possession; and that it had never been paid by the plaintiffs.

Whereupon, the COURT, (THRUSTON, J., absent,) at the prayer of the defendant, instructed the jury that his taking of the promissory note as aforesaid, and the said offer to pay the said balance as aforesaid, were no bar to his remedy by distress; because the note, by the terms of the receipt, until paid, was no payment of the rent.

Mr. Brent, for the plaintiffs, in argument to show that the remedy by distress was suspended until the note became payable, cited *Harris v. Johnstone*, 3 Cranch, 311; *Kearslake v. Morgan*,

Harris v. Firth.

5 T. R. 517; *Thatcher v. Dinsmore*, 2 Wheeler, 316; *DeSymons v. Minchwich*, 1 Esp. 430; *Hogan v. Sehe*, 2 Id. 523; *Willson v. Foree*, 6 Johns. 110.

Mr. Bradley, for the defendant, cited *Skerry v. Preston*, 2 Chitty Rep. 245; *Brown v. Gilman*, 4 Wheat. 256; *Chipman v. Martin*, 13 Johns. 240; *Drake v. Mitchell*, 3 East, 251; Bul. N. P. 182; Comyn on Landlord and Tenant, 405.

Verdict for defendant. Motion for new trial, overruled.

THOMAS SMITH, an Apprentice, v. JONATHAN ELLIOT.

In the indentures of an apprentice, bound out by the Orphans' Court, it is not necessary to state that the apprentice was present in court. It will be presumed, unless the contrary appears.

PETITION, by an apprentice, to be discharged from his indentures.

Mr. Brent, for the petitioner, contended that the indentures were void because they do not state that the boy was present in the Orphans' Court when he was bound out as an orphan child, under the Maryland Act of 1793, c. 45.

The COURT (*nem. con.*) was of opinion that it was not necessary to state that fact in the indenture; as it will be presumed that he was present, unless the contrary should be proved.

The complaint was that the boy was not well fed and clothed; but the Court thought that the complaint was not supported by the petitioner's witnesses, and dismissed the petition, without hearing the defendant's witnesses.

NEGRO HERBERT HARRIS v. FIRTH, Executor of Wilkes.

The place to which a person has removed, with intent to remain there an indefinite time, and as a place of present domicil, is the place of his domicil, although he may entertain a floating intention to return at some future period.

If a person comes into this county as a sojourner, and brings with him his slave, and dies here, and his executor has been prevented, by the institution of this suit, from carrying the slave out of the district, the slave is not, by such importation, entitled to freedom.

PETITION FOR FREEDOM, on the ground that he was brought from Virginia into this county, to reside, contrary to the Maryland Act of 1796, c. 67.

The petitioner offered evidence that one Wilkes, was at the head of a company of sportsmen, (gamblers,) who resided in

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Richmond, in Virginia. That he had hired a house in Washington, in this county, at first for three years, and afterwards for a term not yet expired, and continued to reside therein until his death on the 8th of November, 1834. That during such residence he purchased the petitioner in Virginia and brought him to Washington, where he resided with his master until his death. That Wilkes was considered as a citizen of the world, and before he came to Washington, had lived in Brunswick, in Virginia; sold out there, and lived in Richmond. That shortly before his death he intended, when he had made money enough, to go to the West and speculate in lands.

Mr. Brent, for the petitioner, prayed the Court to instruct the jury that if they shall find, from the evidence, that Wilkes removed to this county with an intention of remaining here for an indefinite time, and as a place of present domicile, this was his place of domicile, notwithstanding he might have entertained a floating intention to go to the west at some future period.

Mr. Brent, in support of his prayer cited Story's Conflict of Laws, 45, 48, and *Bruce v. Bruce*, 2 B. & P. 228.

Mr. Coxe, for the defendant, cited Story's Conflict of Laws, 39, 47; the Maryland Act of 1796, c. 67, § 4, respecting sojourners; and the cases *Negro William v. Sawyer*, (2 Cranch C. C. 373,) *Negro Mary v. White*, (3 Id. 663); and *Jones v. Gassaway*, (2 Id. 334); *Kosciusko's case*, in the Supreme Court of the United States; and *Harrison v. Nixon*; and *Aspin's case*; *Almy v. Bingham*, Robertson on Succession, 468.

The COURT (THRUSTON, J., *contrà*,) gave the instruction as prayed by *Mr. Brent*.

And, at the prayer of *Mr. Coxe*, for the defendant, further instructed them, in effect, that, if Wilkes, being the owner of the petitioner, came to reside here as a sojourner, and while so being a sojourner, brought the petitioner here, and died, and the defendant, since his death, has been prevented by the institution of this suit from carrying the petitioner out of the district, he is not entitled to freedom by reason of his being so brought in.

Verdict for the petitioner.

HOWE, Executor of Frail, v. JOHN McDERMOTT.

When a new trial is granted on payment of costs, although the general rule is that if the costs are not paid by the second day of the term next after granting the new trial, the judgment shall be entered upon the verdict; yet, under particular circumstances the Court will, at that term, set aside the judgment and permit the cause to be tried.

TROVER, for a slave. There was a verdict for the plaintiff at

Bank of United States v. Smith.

the last term. The Court, at that term, upon affidavits granted a new trial upon the condition of payment of costs. Upon the first calling of the trial-docket of this term, the defendant, who lived in Maryland, had not paid the costs, and the Court postponed the cause to the second calling of the docket, when (namely, 26th May, 1836,) the costs not having been paid, the COURT, on motion of the plaintiff's counsel ordered the judgment to be entered upon the verdict, although *Messrs. Key and Dunlop* said they expected their client every moment. Afterwards, namely, on the 18th of June, 1836, the defendant appeared with his witnesses to try the cause, and offered to pay the costs, but the plaintiff issued his execution and arrested him.

Messrs. Key and Dunlop, moved the Court to set aside the judgment, and quash the execution; which the COURT (*MORSELL, J., contra*,) did, upon the condition that the defendant should pay all the costs up to this day, including the costs upon the execution, and an immediate trial or continuance at the plaintiff's option.

MORSELL, J., said that he considered the rule to be that if the costs were not paid by the second day of the term next after the granting of the new trial the judgment should be absolute, and he thought the rule should be rigidly enforced. The parties then agreed to try the cause on the 28th of June, on which day, the costs not having been paid, the judgment was entered up absolutely.

BANK OF THE UNITED STATES v. FLEET SMITH.

If a creditor takes a security, by deed of trust, of personal property, for a debt due to him by an indorsed promissory note, and the debtor becomes tenant of the creditor, and rent is in arrear, and the creditor, who is the landlord, distrains the goods conveyed to the trustee, as security for the payment of the note, and the same goods are sold under the distress, and the proceeds paid over to the landlord, he is bound to apply the proceeds to the payment of the note, although the goods were found on the premises, at the time of the distress, the same being there, by the consent of the landlord, as security for the note; and these facts are admissible, in evidence, on the part of the defendant, who is sued as indorser of the note.

But, at law, the amount of the set-off cannot exceed the proceeds of the sales actually received by the plaintiff.

ASSUMPSIT against the defendant, as indorser of John Strother's promissory note, for \$6,023.22, dated 1st October, 1830, payable to the defendant, or order, in one year, with interest from the date. The plaintiffs having given evidence of the execution and indorsement of the note, and of due demand and notice to the defendant, it was read in evidence to the jury.

The defendant then offered, in evidence, a deed of trust, dated

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1st October, 1830, executed by John Strother, the maker of the note, to Richard Smith, cashier of the Office of Discount and Deposit of the Bank of the United States, at Washington, of all the household furniture, &c., of the tenement called the City Hotel, in Washington, a schedule and appraisement of which was annexed to the deed, in trust, that if Strother should fail to pay the note, when payable, the said Richard Smith should sell the property at public vendue, and apply the net proceeds to the payment of the note, and that Strother should, in the mean time, retain the possession; and Strother agreed to account for the goods, at the appraisement. The defendant also offered evidence that the goods were of the value therein stated; that the plaintiffs, by their proper officers and agents, might have taken the said property and applied it to the satisfaction of the note, immediately upon its protest; that the said Richard Smith, in all the proceedings respecting the said deed of trust, acted as the officer and agent of the bank, and with its privity; that, with the sanction and privity of the bank, he permitted the property to remain in the use and possession of Elizabeth W. Strother, wife of the said John Strother, after he had left the District of Columbia, and gone to the western country, from which he never returned; when the bank, by their duly-constituted agent, levied a distress on the same, for rent accrued after the execution of the said deed, and after the protest of the said note, under a demise from them to the said Strother, of the house, &c., wherein the said property was, at the time of the execution of the said deed, and wherein it continued till the said distress.

That on the 5th of October, 1830, the plaintiffs had caused the said Strother to give two specific securities for the said rent; to wit, a deed from the said John Strother and wife, and Thomas R. Miller, to the said Richard Smith, of five slaves, and a deed of the same date, from Lucy E. Fendall, to the said Richard Smith, for three slaves, each of which deeds authorized the said Richard Smith to sell the said slaves, respectively, in case of the non-payment of the rent, when due. That all the property mentioned in the said deed of the 1st of October, 1830, remaining on the premises when the distress was levied, was sold under the said distress, by the bailiff of the bank, by their direction, and the whole proceeds paid over by him, to the bank; and that, on the 4th of October, 1831, when the said note was protested, and ever after, until such distress and sale, all the said property remained at the disposal of the bank and its proper officers and agents, and subject to their exclusive control and management; and that the bank, through such, its proper officers and agents, might, at any time after such protest, have caused the same to be disposed of,

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and the proceeds applied to the payment of the said note; that the leaving of the said property in the hands of the said Elizabeth W. Strother, and in her use, from the time of the protest of the said note, till such distress and sale for rent, was with the knowledge and consent of the proper officers and agents of the bank, legally acting in its behalf, in the matter.

To the admissibility of the evidence thus offered by the defendant, the plaintiffs objected; but the Court (*nem. con.*) overruled the objection, and permitted the evidence to be given to the jury; and the plaintiffs took a bill of exceptions.

After some further evidence, given, both on the part of the defendant and of the plaintiff,

Mr. Coxe, the counsel for the plaintiff, moved the Court to instruct the jury, that if they shall believe, from the evidence, that the note on which the suit is brought, was indorsed by the defendant, and that payment was duly demanded, and the said note protested for non-payment, and due notice thereof given to the defendant, as indorser thereof, then the plaintiff is entitled to recover; and that the circumstances given in evidence, as to the distress by the plaintiff, for rent due on the premises, and the sale under the said distress, of the property mentioned in the deed of trust of October 1st, 1830, and the receipt of the proceeds of such sale by the plaintiff, do not amount to payment, either in whole or in part, of the said note.

Which instruction the Court refused to give, and the plaintiffs took their second bill of exceptions.

The defendant's counsel, *Mr. Jones*, then claimed for him; first, a credit against the said note for the full value of all the said property upon which the said distress was levied, though such value should exceed what the property produced at the sale; secondly, a credit for the value of so much of the property conveyed by the said first deed of trust as the jury may, from the evidence, find that the plaintiffs might, with reasonable diligence, have had brought to sale, under the said deed, and which was lost or destroyed by the fault and negligence of the plaintiffs.

But the Court, at the instance of the plaintiffs' counsel, decided, and so instructed the jury, that the defendant was not entitled, at law, to any such credit for more than the money actually received by the bank, for the proceeds of the sales so made, under the said distress and deed of trust. To which instruction the defendant excepted.

Mr. Coxe, for the plaintiffs, in order to show that the plaintiffs had a right to distrain the goods conveyed to Mr. Richard Smith, in trust to secure payment of the note, cited Bradby on Distresses, 2d edit. c. 4, p. 73; Comyn on Landlord and Tenant,

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382, 383; *Newman v. Anderton*, 2 N. R. 224; *Davies v. Powell*, Willes, 46, and *Buckley v. Taylor*, 2 T. R. 600.

Mr. Jones and *Mr. Dunlop*, *contra*, contended that where goods are on the premises for a certain purpose, with the consent of the landlord, they are not liable to distress for rent. These goods were left on the premises, with the plaintiffs' consent, for the security of a certain debt for which the defendant was surety. Besides, the bank, which was in effect the trustee under the deed made to their cashier, was bound to preserve the trust-fund to pay the specific debt charged upon it. *Fowkes v. Joyce*, 2 Vern. 129; *Tate v. Glead*, 2 Williams's Saunders, 290, n. 7.

The net proceeds of the sales under the distress, were \$1,262.04, which the jury deducted from the amount of the note, and gave their verdict for the balance, \$5,087.51. No writ of error has been prosecuted.

MARY ELEANOR SHAW, by Joseph N. Fearson, her next friend, *v.*
WILLIAM P. SHAW, MICHAEL GANNON, AND P. J. DRURY AND
MARGARET, HIS WIFE.

This Court, when sitting in a case of partition of intestate real estate, under the Maryland law of descents, (1786, c. 45,) sits as a county court of common law, exercising a summary jurisdiction given by the statute, and has no authority to grant relief as a court of equity.

In making sale of the real estate of an intestate, where it will not admit of a specific division among the heirs, according to the Act of Maryland of 1786, c. 45, § 8, the commissioners may annex to the terms of sale, a condition that if the purchaser shall fail to comply with the terms of sale within a certain number of days, the property shall be resold at his risk; and it is not necessary that the first sale should have been ratified by the Court, in order to charge the first purchaser with the loss upon the resale.

If the husband of one of the heirs is a delinquent purchaser, and liable for the loss upon the resale, his wife's share of the estate cannot be charged with the loss; but if one of the heirs becomes a purchaser, and fails to comply with the terms of the sale, his share of the purchase-money may be applied to make good the loss, although he may, after his default, have assigned his share of the estate, or of the purchase-money, to a stranger; the assignee must take it *cum onere*.

The commissioners appointed, under the act of descents, to sell the real estate of an intestate, are liable to be made defendants to a bill in equity, and may be compelled to answer and account for the money which they have received.

BILL IN EQUITY by a *feme covert*, by her next friend, to have the proceeds of the sale of her share of the intestate real estate of her deceased father vested in a trustee for her sole and separate use; and to charge the loss, which occurred upon the resale, to the first purchasers; one of whom was a co-heir with the plaintiff, and the other, the husband of another co-heir; and to make their shares of the purchase-money liable for such loss.

The bill states that the complainant's father, James Gannon, in

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1829, died intestate, seized of certain real estate in Washington, leaving four children his heirs at law, namely, Michael Gannon, Margaret Drury, wife of Plumer J. Drury, Bartholomew Gannon, a minor, and the complainant, Mary Eleanor Shaw, wife of the defendant, William P. Shaw. That upon a petition for a division of the estate, according to the Maryland Act of Descents, (1786, c. 45, § 8,) the commissioners reported that it was not susceptible of division, without loss, &c., and on the 7th of June, 1832, it was ordered by this Court that the commissioners should sell the estate upon certain terms of credit, and take bonds, &c., payable to each representative according to their respective shares, and that they should bring the money and bonds into court. That it was so sold, at public auction, on the 24th of November, 1832, on those terms, and with this further condition and notice; that the commissioners reserve to themselves the right, in case any purchaser should fail to comply with the terms of sale in five days, to resell the property, sold to him, at public auction, on reasonable terms, and after reasonable notice, and to charge and hold the former purchaser responsible for all loss, costs, and charges in consequence of such failure and resale. That the defendant, P. J. Drury, one of the representatives of the said James Gannon in right of his wife, was the purchaser of certain lots, part of the said real estate for \$4,400; and that the defendant, Michael Gannon, one of the heirs, purchased another part of the estate, at the same sale, for \$2,000. That the whole amount of sales was \$6,538, to one fourth of which the complainant is entitled, after paying costs, &c. That Drury and Gannon neglected and failed to comply with the terms of the sale. That the property which they purchased was afterwards, on the 26th of August, 1833, advertised again for sale at their risk, and resold on the 21st of September, 1833, at a loss, to Drury, of \$1,430; and at a loss, to Gannon, of \$545.

That the complainant, since her father's death, intermarried with the defendant, William P. Shaw, who has become insolvent; and if the purchase-money gets into his hands, it will go to his creditors; she therefore prays that it may be secured to her separate use; and that the loss upon the resale may be made good out of the shares of Gannon, and of Drury in right of his wife; and that the commissioners may be enjoined from paying over to Gannon and Drury, their shares of the purchase-money and bonds.

William P. Shaw, the husband of the complainant, answered and admitted all the facts charged, and offered himself ready to submit to any decree the Court might think proper to make.

The bill was, by consent, amended, by charging an assignment

of Michael Gannon's share to James Gettys, one of the commissioners, who demurred to the bill.

Drury and wife, also, demurred as to so much of the bill as sought to charge Drury with the loss on the resale of the property purchased by him, and to deduct that loss from Mrs. Drury's share of the purchase-money; and they assign for cause of demurrer, that the purchase was at a sale by the commissioners, under and by virtue of an order or decree of this Court on an original suit by petition in behalf of the heirs of James Gannon, yet pending in this court, and that the supposed sale to Drury is void, because it has not been reported to and ratified by the court in that cause; and that all questions relating to that supposed purchase belong to this court in that cause only, and not in the present cause; and because the complainant has not shown any title to such relief.

And as to so much of the bill as seeks to secure the complainant's share to her separate use, the same defendants demurred, because that question belongs to the said petition-cause, and not to this cause.

And as to so much of the bill as seeks to charge Michael Gannon's share for the loss upon the resale of the property purchased by him, the same defendants (Drury and wife) plead, that before this suit was brought he assigned his share to James Gettys in trust for certain purposes in which these defendants are interested.

As to the residue of the bill, they answered and admitted that James Gannon died seized, and intestate; that his four children named in the bill are his heirs at law; that a petition was filed by them in this Court for a division of the real estate, which is still pending; that the complainant has, since the death of her father, intermarried with the defendant, William P. Shaw, who is insolvent; but they claim to be his creditors, and, as such, protest that his share ought not to be liable for the loss on the resale, &c.

Michael Gannon had not answered.

The commissioners demurred to so much of the bill as seeks relief against them.

The cause now came on to be heard upon the demurrers and plea, and was argued by *Mr. C. Cox*, in support of the same, and by *Mr. Marbury*, on the other side.

Mr. C. Cox, in support of the demurrer, on the ground of the pendency of the other suit, for the division of the property, cited *Brown v. Wallace*, 4 Gill & Johns. 479, 494, 496, 509; *Diggs & Keith v. Walcott*, 4 Cranch, 179; *McKim v. Voorhies*, 7 Id. 279; *Elliott v. Peirsol*, 1 Peters, 340; *Richardson v. Jones*, 3 Gill & Johns. 163, 186; *Butler v. The State*, 5 Id. 511.

To show that the sale was not valid because not ratified by the

Court, he referred to the Act of Maryland, 1797, c. 114, § 6; *Massy v. Massy*, 4 Har. & Johns. 144; *Anderson v. Foulke*, 2 Har. & Gill, 354; *Richardson v. Jones*, 3 Gill & Johns. 163.

To show that the wife's interest was not altered by the sale, he cited *The State v. Krebs*, 6 Har. & Johns. 31, and *Leadenham v. Nicholson*, 1 Har. & Gill, 277, 278.

Mr. Marbury, contra, cited *Kenny v. ———*, 5 Johns. 464; *Haviland v. ———*, 6 Id. 178; and to show that the commissioners had power to annex the condition of resale at the risk of the first purchaser, he referred to Sugden on Vendors.

Mr. Cox, in reply, referred again to *Richardson v. Jones*, 3 Gill & Johns. 163, 186.

CRANCH, C. J., after stating the case, delivered the opinion of the Court, (THRUSTON, J., absent,) as follows:

1. The first ground of demurrer suggested by these defendants is, that there is a suit, depending on the common-law side of this Court, in which the complainant may have the relief which she seeks here. But this, I apprehend, is a mistake. The Court, in that cause, sits as a county court of common law, exercising a summary jurisdiction given by a statute which gives no power to grant the relief sought by this bill, and which this Court can only give when sitting as a court of equity.

2. The second ground of demurrer is, that as the sale was not ratified, it was inchoate, and, therefore, Drury and Gannon were not liable for the loss.

But where, according to the terms of the sale, the purchaser agrees to be liable for the loss if he should fail to comply with the terms of the sale according to the contract, and he does so fail, and thereby prevents the ratification of the sale, he becomes liable without ratification.

3. The third ground of demurrer is, that the condition for resale, in case of non-compliance with the terms of sale, is void because the Court had not prescribed any such condition; and the commissioners could not add any thing to the order of the Court.

But by the Act of 1786, c. 45, § 8, the sale is to be made under the direction of the commissioners; and by the Act of 1797, c. 114, § 6, it is to be made agreeably to the order of the court. If the terms prescribed by the commissioners are not inconsistent with the order of the court, they are valid, and form part of the contract of sale. The condition of resale at the risk of the first purchaser, was not inconsistent with the order of the court in that case, and, therefore, was not void.

4. The fourth ground of demurrer is, that Mrs. Drury's share cannot be prejudiced by the act or neglect of her husband. This

demurrer is to that part of the bill which seeks to render her share liable for the loss occasioned by her husband's not complying with the terms of sale. It seems to me that the same equity which will protect the complainant's share from the debts of her husband, should protect Mrs. Drury's from the consequences of the acts or negligence of hers. I think, therefore, that the demurrer must be sustained as to so much of the bill as seeks to charge the share of Mrs. Drury.

5. The plea that Michael Gannon assigned his share to James Gettys before the commencement of this suit, is no answer to the complainant's equity. The assignee must take it *cum onere*. The assignment was made after Gannon's default, by which the complainant's equity accrued. I think the plea should be overruled.

6. The demurrer of the commissioners is only to so much of the bill as seeks relief against them.

The bill seeks no relief against them, except an injunction to stay the money and bonds in their hands until the further order of the Court. But they have the funds and must account for them. This demurrer, therefore, must be overruled, and they should answer to the amount of money and bonds in their hands, in case the Court should order the money to be invested in securities for the benefit of the married women.

I think the demurrer, to so much of the bill as seeks to have the complainant's share set apart and laid out in productive securities for her separate use, must be overruled.

MORSELL, J. concurred.

The cause was afterwards set for final hearing, and the Court decreed according to the above opinion.

UNITED STATES v. GEORGE MILBURN.

An indictment charging that the defendant kept a certain gaming-table called a faro-bank, is not sufficient under the Penitentiary Act of the District of Columbia.

The keeper of a room in which common gaming is carried on for his lucre and gain, and under his management and control, is guilty of keeping a disorderly house, and evidence of his keeping a faro-bank therein may be given under the count for keeping a disorderly house; but an indictment for keeping a common disorderly house is not supported by evidence of keeping a room in which gaming is carried on. It is not necessary to prove that the defendant was also the keeper of the house; nor to prove other disorderly conduct.

THE first count in the indictment was for keeping "a certain gaming-table called a faro-bank."

This count was, upon the defendant's motion, quashed by the Court, for the reasons stated in *Cooly's case*, (*ante*, 707.)

The second count charged that the defendant kept "a certain common, ill-governed, and disorderly house;" "and in the said house, for filthy lucre and gain, certain evil-disposed persons, of evil name, fame, and conversation, to frequent and come together, on the days and times aforesaid, there, unlawfully and wickedly, did cause and procure, and the said persons in the said house, at unlawful times, as well in the night as in the day, on the days and times aforesaid, there to be and remain, drinking, tippling, cursing, swearing, quarrelling, and gaming, and otherwise misbehaving themselves, unlawfully and wickedly did permit and suffer, to the great damage and common nuisance of the good citizens of the United States, in the manifest destruction and corruption of youth and other people, in their manners, conversation, morals, and estate, and against the peace and government of the United States."

Mr. Dunlop, for the United States, to support this count, offered evidence that the defendant kept a public faro-table, at which there was gambling for money.

Mr. W. L. Brent, for the defendant, objected that it was not evidence of his keeping a disorderly house; and *Mr. Dandridge*, on the same side, contended, that, as the keeping of a common gaming-house was a distinct offence, evidence of that offence cannot be given, under this count, for keeping a common disorderly house. It should have been indicted as a common gaming-house. 1 Russ. 267; 3 Chitty, 673, 674.

Mr. Dunlop, contra. A common gaming-house is a common disorderly house, and may be indicted as such. 3 Chitty, 673, 674.

CRANCH, C. J., was of opinion that evidence that the house was kept for a common gaming-house, for lucre and gain, where all persons, disposed to sport their property, were permitted to meet and gamble for money, is evidence of a disorderly house; and referred to *Ismenard's case*, in this Court, at December term, 1803. (1 Cranch, C. C. 160.)

THRUSTON, J., was of the same opinion, but was understood to contend, that, as the indictment was in the common form of an indictment for a disorderly house, charging, among other disorderly conduct, the permitting of gaming, only, and not specifying it to be kept as a common gaming-house, for lucre and gain, the United States could not succeed upon this indictment, although they should prove that the defendant kept a common gaming-house, for lucre and gain, where all persons disposed, &c., were permitted to meet and gamble for money.

MORSELL, J., absent.

The jury having been adjourned to the next day, and the Court being full,

Mr. Brent, for the defendant, moved the Court to instruct the jury, "that, if they should be of opinion, from the evidence, that the defendant was the keeper of a room in which gaming was carried on, yet it does not support the charge in the indictment, which is for keeping a common disorderly house; and unless it be satisfactorily proved that he was the keeper of the house, he cannot be found guilty under the present indictment, but is entitled to a verdict of acquittal, unless the jury should be satisfied that other disorderly conduct has been proved."

Mr. Brent and *Mr. Dandridge*, in support of this motion, contended that a disorderly room is not a disorderly house, and that the indictment should have been for keeping a public gaming-room for lucre and gain. 2 Chitty, 40; 3 Id. 674, 675; Archbold, 363; 3 Chitty, 678, n. k; Bac. Ab. Gaming, A.

Mr. Dunlop, *contrà*, prayed the Court to instruct the jury, "that, if they should be satisfied, from the evidence, that the defendant was the keeper of a room in the house of one Grantham, in which room common gaming was carried on, for the lucre and gain of the defendant, and under his management and control, then he is guilty of keeping a disorderly house, as charged in the second count of the indictment;" and, in support of his prayer, cited 3 Chitty, 623; *Regina v. Pierson*, 2 Lord. Ray. 1197; S. C. 1 Salk. 382; 1 Russell, 299.

The COURT (*nem. con.*) gave the first part of the instruction moved by *Mr. Brent*, namely, that if the jury should be of opinion, from the evidence, that the defendant was the keeper of a room in which gaming was carried on, yet it does not support the charge in the indictment which is for keeping a common disorderly house.

But (THRUSTON, J., *contrà*,) refused to give the residue of that instruction.

And (THRUSTON, J., *contrà*,) gave the instruction prayed by *Mr. Dunlop*.

Verdict, not guilty.

UNITED STATES v. GEORGE McDANIEL.

In an indictment under the Penitentiary Act for the District of Columbia, § 9, for stealing a bank-note, it is not necessary to state that it is a bank-note "for the payment" of money or other valuable thing.

THE indictment charged the defendant with stealing "one bank-note of the Union Bank of Georgetown, to the amount of five dollars, and of the value of five dollars; one bank-note of the Union Bank of Georgetown, to the amount of ten dollars, and of

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the value of ten dollars, &c., stating several others, in like terms. The defendant, having been found guilty, moved, in arrest of judgment, by his counsel, *Mr. Brent* and *Mr. Bradley*, because, in the indictment, it is not averred that the bank-notes were "for the payment of money or other valuable thing."

By the 9th section of the Penitentiary Act for the District of Columbia, of March 2d, 1831, it is enacted, "That every person convicted of feloniously stealing, taking, and carrying away any goods or chattels, or other personal property of the value of five dollars, or upwards, or any bank-note, promissory note, or other instrument of writing, for the payment or delivery of money, or other valuable thing, to the amount of five dollars or upwards, shall be sentenced to suffer imprisonment and labor," &c.

The defendant's counsel cited 3 Chitty, 973, a, 974; Starkie on Crim. Pleading; *United States v. Barry*, in this Court, at November term, 1835. (*Ante*, 606.)

The COURT (CRANCH, C. J., doubting,) refused to arrest the judgment, being of opinion that the averment that it was a bank-note of the Union Bank of Georgetown, to the amount of ten dollars, of the value of ten dollars, was sufficient, and that it was not necessary to aver it to be a bank-note "for the payment of money to the amount of ten dollars." Verdict, guilty.

The COURT sentenced the defendant to three years imprisonment and labor in the penitentiary, but he was pardoned by the President of the United States.

ALEXANDER C. HALL v. THE CORPORATION OF WASHINGTON.

A member of the board of aldermen of the city of Washington is not a competent magistrate to convict a person of a violation of the by-laws of the corporation.

A justice of the peace may reject a plea of misnomer in abatement. A justice of the peace has jurisdiction of penalties under by-laws, not exceeding \$50.

The corporation of Washington has authority to restrain and prohibit gaming in the city.

APPEAL from the judgment of C. T. Coote, Esq., a justice of the peace for the county of Washington, in an action of debt in the name of the mayor, board of aldermen, and board of common council of the city of Washington, for the penalty of \$50, for keeping a faro-bank contrary to a by-law of the corporation.

Mr. Dandridge, for the appellant, objected, (among other things,) that the magistrate was a member of the board of aldermen, and, as such, was a plaintiff in the cause; and cited *Angell & Ames on Corp.* 204; *Dunham v. Rochester*, 5 Cowen, 462; *Hesketh v. Braddock*, 3 Burr. 1847-1856, 1857, 1858; *Pierce v.*

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Abbott, 13 Mass. Rep. 324, 340; *Commonwealth v. Ryan*, 5 Mass. Rep. 90; 7 Cow. 606.

Mr. Bradley, contra, cited Angell & Ames, 389, 390, c. 17, § 8; Starkie on Ev. part 4, pp. 426, 427; *Wood v. The Mayor and Commonalty of London*, 1 Salk. 397; Norris's Peake on Ev. p. 237, note a, and 220, 221, note; Angell & Ames, 199; *Falls & Smith v. Belknap*, 1 Johns. 486; *Corwein v. Hames*, 11 Johns. 76.

The COURT reversed the judgment, because the justice was a member of the board of aldermen and, as such, one of the plaintiffs, and therefore incompetent to try the cause.¹

CRANCH, C. J., delivered the opinion of the Court, as follows:

Appeal from the judgment of a justice of the peace for the penalty of \$50, for setting up, keeping, and exhibiting a faro-table, on the 6th of May, 1835, being a device for the purpose of gaming for money, contrary to the act or acts of the corporation.

By the by-law of Jan. 12th, 1830, § 1, it is enacted, "that no E. O.; A. B. C.; L. S. D.; faro, rolly-bolly, shuffle-board, equality-table, or other device, to be used with cards, balls, dice, coin, or money, or any other game of hazard (except the game of billiards, upon licensed billiard-tables,) for the purpose of playing, or gaming for money or any thing in lieu thereof, shall be set up, kept, or exhibited in any part of this city, under a penalty of fifty dollars for every day or less time that such E. O." &c., "shall be so kept or exhibited, to be recovered before any single magistrate, of the person so setting up, keeping, or exhibiting the same."

The warrant was issued against — Hall, without stating any christian name and was served upon the appellant, who appeared before the justice and pleaded in abatement, *ore tenus*, that his name was Alexander C. Hall, and that the warrant was against — Hall without any christian name. The justice overruled the plea; whereupon the defendant by his counsel told the justice that he might render the judgment, and he would appeal. The judgment was thereupon rendered and the defendant appealed.

Mr. Dandridge, for the appellant contended,

1. That the justice should not have overruled the plea in abatement.

2. That the justice had not jurisdiction of a cause in which the penalty exceeded \$20.

3. That the justice, being an inhabitant of the city, and an alderman, is interested, as the penalty goes to the city.

4. That Congress had no authority to give the corporation power to pass such a by-law.

¹ In the case of *Newton v. The Corporation of Washington*, at the same term, the judgment was affirmed; the justice, although an inhabitant of the city was not a member of the board of aldermen or common council, nor mayor, and therefore competent to decide the case.

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5. That Congress, by the Penitentiary Act of 1831, having made the keeping of a faro-bank, or other common gaming-table a penitentiary offence, has thereby virtually repealed so much of the charter which authorizes the corporation of Washington "to restrain or prohibit all kinds of gaming," (see charter of 1820, § 7,) as relates to the keeping a faro-bank; and that the repeal of the power of the corporation to pass such a by-law, is a repeal of the by-law itself.

1st. As to the plea of misnomer.

The proceedings before justices of the peace are *ore tenus* and need not be very formal; and unless the plea offered will enable the magistrate to decide the case according to the law, equity, and the right of the matter, I am of opinion that he may reject it.

The plea offered in the present case was merely a dilatory plea. If the justice had allowed it the only effect would have been a very short delay, as he might immediately have issued another warrant against the defendant by his right name. I do not think that this is sufficient ground to reverse the judgment; particularly as the defendant, by confessing the judgment, admitted the merits of the case to be against him.

2d. That the justice had not jurisdiction of the cause.

In the case of *Julia Reed* (*ante*, 582,) at the last term, it was decided by this Court, upon great consideration, that the justices of the peace had jurisdiction of fines, penalties, and forfeitures under the by-laws of the corporation.

But it is now said that their jurisdiction is confined to cases where the fine, penalty, or forfeiture does not exceed \$20. It is true that the jurisdiction when first given by the charter of 1802, was thus limited; but the Act of March 1st, 1823, which extended the jurisdiction of justices to \$50, provides that, "in all cases where the real debt and damages do not exceed the sum of fifty dollars, exclusive of costs, it shall and may be lawful for any one justice of the peace, of each respective county within the District of Columbia, wherein the debtor doth reside, to try, hear, and determine the matter in controversy," &c., "in the same manner and under the same rules and regulations, to all intents and purposes, as such justices of the peace are now authorized and empowered to do when the debt and damages do not exceed the sum of \$20, exclusive of costs."

The justices of the peace had, at that time, jurisdiction of cases under the by-laws, where the penalty did not exceed twenty dollars. This act, therefore, extends their jurisdiction to cases where the penalty does not exceed fifty dollars.

3d. The third objection, is, that the justice was interested, because he was an inhabitant of the city to whose benefit the

penalty, in part, accrues ; and that he was a member of the board of aldermen, and therefore nominally one of the plaintiffs.

It is a general principle, that a judge, who is interested, is incompetent to try the cause ; and by the common law, the smallest interest is said to be sufficient to disqualify him. But from the necessity of the case, he must often act in cases in which he is interested. Every citizen of the United States, is interested in every fine that accrues to the United States, yet the jurors and judges are citizens. In the States, the same thing occurs ; and the interest increases in proportion to the diminution of the society that is to enjoy the benefit of the fine. Where shall we stop and say that the interest is sufficient to exclude the judge ?

In the case of *Pearce v. Atwood*, 13 Mass. Rep. 340, Chief Justice Parker said : " Any interest, therefore, however small, has been held sufficient to render a judge incompetent. The only known exception to this broad and general rule, exists where there may be a necessity that the person, so interested, should act, in order to prevent a failure in the administration of justice, as in the case of *The Commonwealth v. Ryan*, 5 Mass. Rep. 90."

That case was a prosecution for a penalty of \$50 accruing to the town of Boston, for keeping a billiard-table. There was a motion to quash the indictment, because the foreman of the grand jury, who found the indictment, was a taxable inhabitant of the town, and therefore interested to convict the defendant. Chief Justice Parsons said : " This interest at common law would be a sufficient objection ; and it now is, unless by a necessary construction of our statutes, this objection is removed. As the Municipal Court has jurisdiction of the offence, and as it can proceed to indict only by the inhabitants of Boston, if the objection should prevail, that court is, in fact, ousted of its jurisdiction."

As the offence could not be prosecuted in any other court, the motion to quash the indictment was overruled.

The same point was decided in *Hill v. Wells*, 6 Pick. 103. The only case cited to the contrary was that of the *Mayor, &c. of Jonesborough v. McKee*, 2 Yerger's Tennessee, Rep. 168, which is a very short case, and reported without argument. The court decided " that a magistrate who is a member of an incorporated town, is not thereby disqualified from trying a warrant or suit in which the corporation is a party."

Some of the English cases seem to make a difference as to the competency of a corporator as a witness in a case between the corporation and a stranger ; and the corporation and a corporator ; and also between private and public corporations ; but to what extent that difference will affect the competency of a judge, does not appear. In a public corporation, the interest which each

United States v. Parsons.

inhabitant of the city or town has, is only a common interest, and seems so nearly assimilated to that which every citizen of a State has in a fine or penalty which is to accrue to the State, and which has not been held sufficient to disqualify the witness or the judge, that I am inclined to think that the objection ought not to prevail.

But it was said, and not contradicted, that the justice who tried the cause, was a member of the board of aldermen. If so, he was one of the plaintiffs, and could not sit in his own cause; according to the decision of this Court, in the case of *Barney v. Corporation of Washington*, at July term, 1805, (1 Cranch, C. C. 248,) where one of the reasons given for the reversal of the judgment, was, that it was rendered by Mr. Brent, the mayor, in a case in which he was a party.

This objection seems to me to be fatal.

4th. The fourth objection is, that Congress had no authority to give the corporation the power to restrain or prohibit gaming. I do not recollect by what argument, or on what ground this position was attempted to be supported, and can imagine none.

The 5th is, that Congress by making the keeping of a faro-bank, a penitentiary offence, has virtually repealed so much of the charter, as gives the corporation power to prohibit the keeping of a faro-bank.

But the penitentiary law and the by-law are not inconsistent. The Penitentiary Act punishes the offence generally; that is, when committed in any part of the district. The corporation, for the preservation of the morals of the city, superadd a penalty, when it is committed within their jurisdiction. The one is an offence against the government of the United States; the other is the violation of the by-law of the corporation. I think this objection also should be overruled. But as the justice, who rendered the judgment, was incompetent to try the cause, the judgment ought to be reversed; but without costs.

MORSELL, J., concurred.

THRUSTON, J., not having been present at the argument, gave no opinion.

UNITED STATES v. JOSEPH PARSONS *et al.*

If the goods stolen be charged as the goods of A. B., and if upon evidence, it appears that A. B. was a *feme covert* and that the goods were the property of her husband, the Court will not instruct the jury to find the prisoners not guilty, if the husband be absent and not contributing to her support, and she keeping house by herself.

JOSEPH PARSONS, John Callihan, and William Drane were indicted for stealing the goods of Ann Bell. It appeared, upon the trial, that Ann Bell's husband was temporarily absent seeking

employment as a printer elsewhere, and did not contribute to her support; and that she kept house in Washington.

Mr. W. L. Brent, for the defendant, prayed the Court to instruct the jury that if they should be satisfied, by the evidence, that Ann Bell was a *feme covert*, and that the goods stolen were the property of her husband, they should find the prisoners not guilty upon this indictment.

But the COURT (CRANCH, C. J., *contrà*,) refused to give the instruction.

Verdict, guilty.

UNITED STATES v. FLEET SMITH.

If the indictment does not describe an indictable offence, the magistrate, who takes the bail in the case, has a discretion as to the amount of the bail, and no corrupt motive can be imputed to him on account of the smallness of the amount in which the bail is taken.

The act not being illegal, the Court will not permit evidence to be given of a corrupt motive.

INDICTMENT for taking insufficient bail upon a bench-warrant against Miller for "keeping a certain gaming-table called a faro-bank."

Mr. Brent and *Mr. Bradley*, for the defendant, prayed the Court to instruct the jury that the prosecution cannot be sustained, as this Court has quashed the original indictment against Miller, on the ground that it did not describe an indictable offence.

The bench-warrant which issued upon the presentment was "to answer to a certain misdemeanor, as it is presented," without further description of the offence; and upon reference to the presentment, it does not appear that any offence is charged.

Mr. Dunlop, for the United States, *contrà*, contended that the magistrate had no right to judge of the validity of the indictment, nor whether it was an indictable offence.

Mr. Bradley and *Mr. Brent*, in reply, cited Starkie on Criminal Evidence, 168, and 2 Chitty, c. 8, pp. 144, 158.

The COURT (MORSELL, J., absent,) instructed the jury, that as the indictment did not describe an indictable offence, and the justice had discretion as to the amount, no corrupt motive can be imputed to him from the smallness of the bail taken. It was not an illegal act, and therefore the motive is immaterial.

And CRANCH, C. J., added, that if any corrupt act was done to obstruct the due course of justice, it might be the ground of a separate count, or indictment; but upon this count the act of taking the bail in \$20 only, not being illegal, the Court will not admit evidence of a corrupt motive.

CIRCUIT COURT OF THE UNITED STATES.

MAY TERM, 1836, AT ALEXANDRIA.

CHARLES B. CALVERT *v.* WILLIAM B. STEWART.

A landlord, who distrains horses, in Maryland, for rent, and hires them out, and permits them to go into the District of Columbia, where they are attached for a debt due by the tenant, does not thereby lose his lien upon the horses for the rent, but may maintain replevin for them in the said district, notwithstanding the attachment.

Upon the issue of *non cepit* the plaintiff must prove that the defendant took the property from the possession of the plaintiff.

REPLEVIN. Pleas *non cepit*, and property in G. W. Delaplaine. General replication and issue to both pleas.

In order to maintain the issue on the part of the plaintiff, he offered evidence, without objection, that Delaplaine was the tenant of George Calvert in Prince George's county in Maryland; and being indebted for rent-arrear, the plaintiff as bailiff of G. Calvert, on the 13th of January, 1834, distrained a wagon and two horses, the property of Delaplaine, found on the premises, and advertised them for sale, and delivered them to a Mr. Taylor, to keep till the sale, who, with the consent of George Calvert, the landlord, hired them to one Farrell, to go to Washington, in the District of Columbia. Farrell took them to Alexandria, and put them up in the stable of the defendant, William B. Stewart, an innkeeper, where they were attached on the 15th of January, 1834, for a debt due by Delaplaine to Lambert & McKensie; and the plaintiff replevied them in the present action.

Upon the trial, the COURT, (*nem. con.*) upon the motion of the defendant's counsel, Mr. Neale, instructed the jury that the plaintiff cannot recover upon the issue of *non cepit*, unless he satisfies them, by evidence, that the defendant actually or constructively, took the property from the actual or constructive possession of the plaintiff.

Mr. Neale also moved the Court to instruct the jury, in effect, that by the hiring out of the property, and suffering it to be car-

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ried out of the State of Maryland, the plaintiff lost his lien, and could not now, here, maintain replevin upon it.

Which instruction, the COURT (CRANCH, C. J., *contra*,) refused to give.

CRANCH, C. J., thought, that by hiring out the property, and suffering it to be taken out of the State of Maryland, the plaintiff lost his lien; that his action of replevin admits that he lost the possession, and that with the possession his lien ceased. That the distress was, in its nature, a local remedy, confined to the territory and jurisdiction of Maryland, and which could not be enforced here.

At first, without recollecting the statute, (11 Geo. 2, c. 19, § 19,) he thought that the plaintiff, by hiring out the distress, and sending it out of the county and State, was a trespasser *ab initio*, and could not justify under the distress; but upon recollecting that statute, he retracted that part of his opinion; but still held, that although trespass may be maintained upon possession alone, yet replevin cannot without a title either general or special. See *Williamson v. Ringgold*, in this Court, at December term, 1829; *Meany v. Head*, 1 Mason, 322, Mr. Justice Story's Opinion; Stat. 52, H. 3, c. 4; 2 Bac. Ab. tit. Distress, D.; Gilbert on Replevins, 157, 164; *Gardner v. Campbell*, 15 Johns. 401; 2 Wheat. Selwyn, 896.

Mr. Taylor, for the plaintiff, cited Comyn on Landlord and Tenant, 410.

Mr. Neale, for the defendant, cited 3 Bl. Com. 12; Bradby, 240; Whitaker on Lien, 68, 69; Paley on Agency, 224 to 230, and 234, 235, 236, and 237; *Shannon v. Shannon*, 1 Sch. & Lef. 324; *Dod v. Monger*, 6 Mod. 215; *Sweet v. Pym*, 1 East, 4.

Verdict for the plaintiff.

WILLIAM HAMILTON v. FRANKLIN AND ARMFIELD.

An absolute bill of sale of personal property, where the possession does not accompany and follow the deed, is void, at common law, as to subsequent purchasers without notice, although acknowledged and recorded agreeably to the Maryland Act of 1729, c. 8, §§ 5 and 6.

DETINUE, FOR A SLAVE. Both parties claimed under one Howard; the plaintiff by virtue of a bill of sale made in Charles county, in Maryland, in 1829; the defendants under a recent sale in Alexandria, D. C. The bill of sale to the plaintiff, which was absolute upon its face, was acknowledged and recorded according to the Maryland Act of 1729, c. 8, §§ 5 and 6, but the possession

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remained in the vendor until his sale to the defendants, who were *bonâ fide* purchasers, for valuable consideration, without notice of the plaintiff's claim.

Mr. Taylor, for the defendants, contended that as the possession did not accompany and follow the deed, it was, in law, fraudulent as to the defendants. And of that opinion was the Court, (THRUSTON, J., *contra*.)

CRANCH, C. J., cited the case of *Durham & Whitridge v. Ashton*, in this Court, at November term, 1832, and stated that the ground of that opinion was that such a deed was void at common law, as decided by the Supreme Court of the United States in the case of *Russell v. Hamilton*, 1 Cranch, 309; that the Maryland statute did not repeal the law in that respect, but was in affirmance of it; and that the acknowledging and recording of a deed void at common law, did not make it valid.

CIRCUIT COURT OF THE UNITED STATES.

OCTOBER TERM, 1836, AT ALEXANDRIA.

UNITED STATES v. WILLIAM TAYLOR.

In a criminal prosecution the Court will not hear a motion to quash the indictment until the defendant has been taken.

When a statute creates an offence, and directs the particular mode of prosecution, that mode must be pursued.

THE defendant was indicted for playing at cards in a public place, contrary to the statute of Virginia, of December 8, 1792, § 5, which imposes a fine of \$20 upon conviction before a justice of the peace, to be levied by distress and sale of the offender's goods by warrant from the justice.

Mr. Neale, for the defendant, at the last term, before the defendant was taken, offered to move the Court to quash the indictment; but the COURT, *THRUSTON, J., contra*,) refused to hear the motion until the defendant should be taken.

The defendant being now taken, *Mr. Neale* moved the Court to quash the indictment, upon the ground that the only mode of recovery of the penalty prescribed by the statute is by a conviction before a justice of the peace; according to the case of *United States v. Simms*, 1 Cranch, 252.

And upon that ground the COURT quashed the indictment.

JAMES W. BRECKENRIDGE v. COLIN AULD.

To support an action for a malicious arrest, it is necessary for the plaintiff to show, not only that it was made maliciously, but without probable cause.

A ca. sa. upon a judgment is good cause of arrest, and a declaration for a malicious arrest, showing such cause, is bad on demurrer.

ACTION upon the case, for maliciously causing the plaintiff to be arrested upon a writ of *capias ad satisfaciendum* issued upon a judgment in the name of one Smoot for the benefit of Auld against the plaintiff, Breckenridge.

United States v. Carter.

The declaration stated the judgment and the *ca. sa.*, and averred that the defendant, Auld, maliciously caused the plaintiff to be arrested thereupon, when he (the defendant, Auld,) knew himself to be indebted to the plaintiff (Breckenridge) in a sum larger than the amount due upon the *ca. sa.*

To this declaration the defendant demurred.

Mr. Taylor, for the defendant. There must be not only malice, but there must be the want of probable cause of arrest. But the declaration shows the best possible cause, namely, a judgment and *ca. sa.*; and, therefore, whatever might be the malice, the plaintiff cannot recover on this declaration. 1 Chitty, 136, 137; *Belk v. Broadbent*, 3 T. R. 185. Besides, the declaration does not show that Breckenridge offered to set off his claim against Auld before his arrest; and there was no statute of set-off in Virginia. And the suit upon which the *ca. sa.* issued is not at an end. The execution is still in the power of the Court in Virginia. Breckenridge might have an *audita querela*, or a motion to quash, or to enter satisfaction. Bingham on Executions, 269; *Chapman v. Moore*, 3 Hen. & Munf. 260.

Mr Neale, *contrà*, contended that the motive gives the cause of action; and that it is sufficient to prove that Auld, when he caused Breckenridge to be arrested on the *ca. sa.* knew that he was indebted to Breckenridge in a larger sum. That the suit was terminated by the arrest of B. upon the *ca. sa.* *Keightley v. Birch*, 3 Camp. 521; *Rogers v. Brewster*, 5 Johns. 125; *Cooper v. Booth*, 3 Esp. 135, 144; *Norris's Peake*, 479; *Wetherden v. Embdon*, 1 Camp. 295; 2 Chitty, 291, 295; 3 Id. 419.

The Court (*nem. con.*) was of opinion that the declaration was bad.

 UNITED STATES v. GEORGE CARTER.

An indictment at common law, in the county of Alexandria, will lie against a free negro or mulatto for assault and battery upon a white man; notwithstanding the Virginia statute of the 17th of December, 1792, § 17.

To an indictment at common law for assault and battery upon William Ball, a white man, the defendant, by his counsel, *Mr. Neale*, filed the following plea:—

“And the said George Carter in his own proper person comes and says that the said United States ought not, neither ought the judges of the United States for the county of Alexandria in the District of Columbia, to have or take further cognizance of the indictment aforesaid; because he says that the cause or causes of action by indictment, and each and every of them are out of the

jurisdiction of the honorable the judges of the Circuit Court of the District of Columbia held for the county of Alexandria. Because, he further says, 1. That he is a freeman of color. 2. That even if he was guilty of the offence as charged in the indictment, still it is not such an offence as this Court can entertain by indictment, at common law, or under any other law; "because, by the Act of Assembly of Virginia, now in force in this county, (Alexandria,) entitled 'An Act to reduce into one the several acts concerning slaves, free negroes, and mulattoes,' passed the 17th of December, 1792, such offence, if committed by 'any negro or mulatto, bond or free,' shall be tried before a justice of the peace of the county or corporation where such offence shall be committed; and, if convicted, shall receive such punishment as the justice shall think proper, not exceeding thirty lashes on his or her bare back. That there is no law in the District of Columbia or in the county of Alexandria which gives this honorable Court jurisdiction in this case, and this he is ready to verify. Wherefore he prays judgment if the said United States, or the honorable the judges of the United States for the District of Columbia and county of Alexandria, will or ought to take further cognizance of the indictment aforesaid."

To this plea was appended the usual affidavit.

The COURT (*nem. con.* but THRUSTON, J., doubting,) overruled the plea.

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ABATEMENT.

A plea of misnomer in abatement is too late after the expiration of the rule to plead. *Brooklyn White Lead Company v. Pierce*, 531.

ACCOUNT.

1. It is competent for the Court to admit evidence of equitable claims against the United States which have been rejected by the accounting officers of the Treasury of the United States. *United States v. Fitzgerald*, 203.
2. An account, although duly authenticated according to law, is not, *per se*, evidence of a balance due on a former account, nor of items transferred from the account of any other person; nor of items recharged which had been before credited. *United States v. Kuhn*, 401.
3. From the fact that the defendant objected to certain items of debit in the account, and was silent as to the other items, the jury may and ought to infer that he acquiesced in the items not objected to; unless they shall be satisfied that he did not so intend; the burden of proof of which is on the defendant. *Ibid.*
4. The jury may infer that the defendant claimed no credits but such as are stated in the "reconcilement," and ought so to infer unless the defendant can show that there were other credits claimed by him, or to which he is entitled. *Ibid.*
5. If the United States produce in evidence the defendant's account current showing a balance in his favor, he is entitled to a verdict, unless the plaintiff shall prove errors or omissions in that account, which shall turn the balance the other way. To rebut such *primâ facie* evidence, it is not sufficient to show that certain claims of the defendant were suspended by the proper accounting officers on the coming in of the account current containing them, and were subsequently disallowed by any Secretary of the Navy. *Ibid.*
6. The defendant claimed a credit of \$4,480.13 for commissions at five per cent. on money disbursed by him for the Quartermaster's Department. The amount of the disbursement was proved by the accounting officers of the Treasury; and on the back of the document produced by the United States and containing the defendant's claim for the credit, was an indorsement by the Fourth Auditor, dated March 2d, 1829, that he had been verbally directed by the then Secretary of the Navy to allow the claim; it being for extra-official service. The Court held that, to rebut this evidence, it was not sufficient to show that a subsequent Fourth Auditor referred the claim to a subsequent Secretary of the Navy, who rejected it, and that there was no evidence that such commissions had been allowed in any like case; and that no precedent could be found for it in the proceedings of the department. And the Court also held, that in order to rebut the *primâ facie* evidence arising from the production and giving in evidence by the United States of the defendant's account containing the charge, it is incumbent on the United States to satisfy the jury that the charge was such as the Secretary of the Navy ought not to have allowed. *Ibid.*
7. The Court instructed the jury, in effect, that if the Secretary of the Navy did not direct the Fourth Auditor to allow the specific sum claimed, but only to make such allowance as on examination he should find to have been made in similar cases, they should, from a consideration of all the evidence make such allowance as they should find had been usually made in similar cases; and if it should appear that no such allowance had been made in any similar case, then to make such as they should deem reasonable.

ACCOUNT, (*Continued.*)

- And the Court further instructed the jury, in effect, that the Secretary had a right to order the Fourth Auditor to make such allowance; and if made by him, it amounted, in law, to an actual allowance by the Secretary himself.
- And further, that if the Secretary of the Navy did authorize the allowance of the claim, and the accounting officers omitted to pass the same, without any default of the defendant, then the defendant is entitled to such allowance, unless it was made by fraud, imposition or misapprehension of the facts of the case. *Ibid.*
8. The paymaster of the marine corps was not, by law, entitled to the pay of a major in the general staff nor of a major in the cavalry from November, 1821, to October, 1830. Up to the year 1828, he had received the pay and emoluments of a major in the infantry; and this was continued to him until 1831, by the resolution of May, 1830. *Ibid.*
 9. The books of account of a paymaster are to be considered so far public books as to authorize the United States to use them in evidence. *Ibid.*
 10. After a credit has been given by the United States and the account settled, it is not competent for the United States to open the account and revoke such credit, unless it were originally given by fraud, imposition, or mistake. *Ibid.*

ADMINISTRATION.

1. An executor may be allowed credit for a loss upon the sale of stocks sold, although the sale should have been made without the order of the Orphans' Court. *Ex parte Jones*, 185.
2. In the administration of the estate of a deceased person, debts are always to be paid according to their respective dignity as regulated by the law of the country where the representative of the deceased acts and from which he derives his powers; not by the law of the country where the contract was made. *Union Bank of Georgetown v. Smith*, 21.
3. In the administration of the estate of a deceased person in the county of Washington, D. C., a judgment of a justice of the peace is not on a par with the judgment of a court of record, and is not entitled to priority of payment. *Bettinger v. Ridgway*, 340.
4. Money received by the defendant for the estate of the intestate, in the lifetime of the first administrator, may be recovered as assets in an action by a subsequent administrator. *Blydenburgh v. Lowrey*, 368.
5. Letters of administration, granted by the surrogate of Suffolk county, in New York, upon *bona notabilia* from there, will enable the administrator to recover assets in the District of Columbia, under the Act of Congress of June 24, 1812, § 11. *Ibid.*
6. The Orphans' Court may charge the administrator with interest in certain cases. *Union Bank of Georgetown v. Smith*, 509.
7. If the administrator mingled the assets with his own funds, upon which he drew indiscriminately for his own purposes, he must be presumed to have applied them to his own temporary use and profit, and is chargeable with interest thereon for the whole time the assets were thus mingled and used indiscriminately; and the Orphans' Court ought to have so decided. *Ibid.*
8. No creditor can maintain an action against the administrator of his debtor, upon his administration bond before a *non est* returned upon a *capias ad respondendum* against the administrator, or a *fi. fa.* returned *nulla bona*, or other apparent insolvency.

The Maryland Act of 1720, c. 24, § 2, is in force in the county of Washington, D. C. *United States, use of Warder v. Kenedy*, 592.

9. An action may be maintained upon an administration bond, by a creditor of the intestate, after a return of *non est inventus* upon a *capias ad respondendum* against the administrator, although thirteen months shall not have elapsed since the granting of the letters of administration. The Maryland Act of 1720, c. 24, is in force in Washington county, D. C. *United States, use of Keirle v. Shaw*, 593.
10. Letters testamentary, granted without security, agreeably with the will of the testator, may be revoked by the Orphans' Court, upon the petition of creditors. *Laird's Executor v. Dick et al.* 666.

AFFIDAVIT.

1. An affidavit of notice may be made and sworn to before the counsel of the party, and may be wholly in his handwriting. *Atkinson v. Glenn*, 134.

AFFIDAVIT, (Continued.)

2. An affidavit, annexed to an account, that "it is just and true as stated, and that no part thereof has been paid, except what is credited," is sufficient to hold the defendant to bail. *Clarke et al. v. Druet*, 142.
3. It is not a valid objection to an affidavit to hold to bail in slander, that the plaintiff therein states that he is credibly informed and verily believes that the defendant spoke the words; the affidavit being positive that the plaintiff had sustained damage thereby to the amount of \$5,000. *Stettinius v. Orme*, 342.
4. Upon a suggestion that a witness, whose affidavit had been taken in support of a motion for a new trial, was an idiot, the Court required the witness to be brought in and examined in court, but refused to order another witness, whose affidavit had also been taken for the same purpose, to be brought in and examined, his affidavit not being impeached. *United States v. R. B. Lloyd*, 472.

AGENT.

1. A Register of the Treasury of the United States is entitled to a reasonable compensation, as agent for disbursing the money appropriated for the contingent expenses of the Treasury Department, Library of Congress, and other appropriations for public purposes, although at the same time he discharges the duties, and receives the pay of Register of the Treasury; and such compensation is not barred by the statute of limitations. *United States v. Nourse*, 151.
2. Money paid upon an erroneous judgment, may be recovered back in an action for money had and received; and if the money shall have been paid to an agent of the original plaintiff, and remain in his hands at the time of reversal and demand, it may be recovered of the agent. If the amount of the judgment be paid to the plaintiff's agent, and he be notified, at the same time, that a writ of error will be taken out to reverse the judgment; and that he will be expected to return it, if the judgment should be reversed; if he then pay over the money to his principal, without security for his indemnity, it is at his own peril. *Bank of Washington v. Bank of the United States*, 86.

ALDERMAN.

An alderman of the city of Washington, cannot sit as a judge in a case in which the corporation of which he is a member, is a party. *Hall v. Corporation of Washington*, 722.

ALIMONY.

A bill having been filed for alimony, the Court, upon the petition of the complainant for a temporary support, *pendente lite*, ordered two dollars a week to be paid to her, until the further order of the Court. *Auld v. Auld*, 84.

AMENDMENT.

1. In ejectment, the fictitious lease may be amended, after the jury is sworn; upon payment of the costs of the term. *McDaniel v. Wailes*, 201.
2. Bail will not be discharged by leave to amend the declaration, unless the amendment charges a cause of action different from that upon which bail was given. *Carrington v. Ford et al.* 231.
3. An amendment conforming the declaration to the cause of action upon which bail was given, will not authorize a discharge of the bail. *Ibid.*
4. An information, in the nature of a writ of *quo warranto* may be amended. *Guntton et al. v. Ingle et al.* 438.

APPEAL.

1. The condition of an appeal-bond is broken, unless the judgment is reversed in toto. *Butt v. Stinger*, 252.
2. Appeals from the Orphans' Court of the county of Alexandria, D. C., are governed by the same rules as in the county of Washington, and must be taken within the time limited by the Maryland Testamentary System, c. 15, § 18. *Tracy v. Scott*, 250.
3. Upon an appeal, it is in the discretion of this Court to allow or refuse costs upon the reversal of the judgment of a justice of the peace. *Ward v. Corporation of Washington*, 232.
4. In an action upon an appeal-bond to the Supreme Court of the United States, in setting forth the breach of the condition, it must be averred that the plaintiff has sustained damages to a certain amount, by the defendant's not making his plea good.

APPEAL, (*Continued.*)

The defendant is not, by the condition of the bond, bound absolutely to pay the amount of the original judgment; nor even the damages and costs that may be awarded by the appellate court for the delay; but only to answer such damages and costs as the appellee shall sustain by the appellant's failure to make the plea good. *Bank of the Metropolis v. Swann*, 139.

5. Although an appeal will not lie to the judgment of a justice of the peace, upon a verdict of a jury, yet, if the defendant does in fact appeal, and give an appeal-bond, the plaintiff may maintain an action upon that bond. *Chase v. Smith*, 90.
6. An appeal lies from the judgment of a justice of the peace, in the county of Washington, D. C., for the penalty of a by-law of the corporation of Washington. *Corporation of Washington v. Eaton*, 352.
7. A justice of the peace in the county of Washington has jurisdiction of offences against the by-laws of the corporation of Washington, although the amount of the penalty be discretionary within certain limits. That discretion does not deprive the party of his right of appeal. *Ibid.*

APPRENTICE.

1. The Orphans' Court of Alexandria county has authority to bind out orphan children without indenture. *Bell v. English*, 332.
2. An entry on the minutes of the Orphans' Court, "that Peyton Hines be bound apprentice to Peter Hewitt," does not constitute a lawful binding. *Hines v. Hewitt*, 471.
3. The binding out of an apprentice, by two justices of the peace, in Washington county, D. C., is of no effect unless the parent or parents, if living, approve and indorse the indentures within two months. *Barrett v. McPherson*, 475.
4. Justices of the peace in Washington county, D. C., have no authority to bind out an orphan child while the Orphans' Court is in session. *Gody v. Plant*, 670.
5. Justices of the peace in Washington county, D. C., have no power to bind out an orphan not brought before them.
If the Court discharge an apprentice, they will order him to be bound out by the Orphans' Court, to a person named in the order. *Smith v. Elwood*, 670.
6. A stranger to the indenture of apprenticeship cannot take advantage of the omission to insert the age of the apprentice. *Heinecke v. Rawlings et al.* 699.
7. In the indentures of an apprentice bound out by the Orphans' Court, it is not necessary to state that the apprentice was present in court; it will be presumed, unless the contrary appears. *Smith v. Elliot*, 710.

ARREST.

1. It is a long-established principle of the common law, that a man shall not be twice taken in execution for the same cause.
This principle is as applicable to the United States as to other creditors; and, under the Maryland law, is as applicable to a *ca. sa.* for a fine, as to a *ca. sa.* for any other debt. *United States v. Watkins*, 271.
2. A constable is not in the discharge of his official duty when searching for a man, (who is represented to him as, and who he believes to be, a loose and disorderly person, without visible means of livelihood, a night-walker, and frequenter of bawdy houses, and a keeper of false keys,) with intent to arrest him without a warrant, and carry him before a justice of the peace, to be dealt with according to law; and it is not an indictable offence to threaten to kill the constable if he should attempt to arrest him. *United States v. Goure*, 488.
3. *Quære*, whether a new *capias ad respondendum* for a misdemeanor can be lawfully issued while the party is in custody of his bail, upon a former *capias* for the same offence, he having failed to appear according to the tenor of the recognizance of bail? *United States v. Milburn*, 552.
4. An action for false imprisonment will not lie for an arrest upon an execution which is only voidable, and not void. *Devlin v. Gibbs et al.* 626.
5. An execution against two only, upon a judgment against three, is erroneous, not irregular; voidable, not void. *Ibid.*
6. To support an action for a malicious arrest, it is necessary for the plaintiff to show, not only that it was made maliciously, but without probable cause. *Breckenridge v. Auld*, 731.
7. A *ca. sa.* upon a judgment is good cause of arrest, and a declaration for a malicious arrest, showing such cause, is bad on demurrer. *Ibid.*

ASSAULT AND BATTERY.

1. If several damages be assessed upon a writ of inquiry on a judgment by default, in an action of assault and battery against two, the plaintiff may enter a *nolle prosequi* against one and take final judgment against the other. *Conner v. Cock-erill & Gault*, 3.
2. A conviction and sentence of an individual, not a member of Congress, by the House of Representatives of the United States, for a breach of privilege, by assault and battery upon a member of the House, for or on account of words by him spoken in the House of Representatives, in debate, are not a bar to a criminal prosecution, by indictment, for the same assault and battery. *United States v. Samuel Houston*, 261.
3. An indictment will not lie, under the Penitentiary Act, for an assault, with intent to kill; there must be a battery also. *United States v. Turley*, 334.
4. A simple assault and battery upon a slave is not an indictable offence.
A simple assault upon a slave, even with intent to murder him, is not an offence at common law.
There must be a battery, as well as an assault, with intent to kill, to bring the case within the Penitentiary Act; but the Court refused to quash the indictment without prejudice to a motion in arrest of judgment. *United States v. Henry Lloyd*, 468.
5. Upon an indictment for assault and battery on M. H., with intent to kill him, a verdict, "guilty of an assault, by shooting M. H., with intent to kill," is substantially a general verdict of guilty. *United States v. Richard B. Lloyd*, 472.
6. An indictment under the Penitentiary Act, for assault and battery, with intent to kill, need not aver it to be done with malice aforethought, nor with any other evil intent than the intent to kill. *Ibid.*
7. Upon an indictment at common law, for an assault, with intent to kill and murder, the defendant may be found guilty of the simple assault only. *United States v. Copley*, 517.
8. A person convicted of assault and battery committed in a riot, may still be tried and convicted of the riot. *United States v. Peaco et al.* 601.
9. Upon an indictment against the husband, for assault and battery upon his wife, she may be examined as a witness against him. *United States v. Thomas Fit-ton*, 658.
10. An indictment at common law, in the county of Alexandria, will lie against a free negro or mulatto, for assault and battery upon a white man, notwithstanding the Virginia statute of the 17th of December, 1792, § 17. *United States v. Carter*, 732.

ASSIGNMENT.

1. In an action of covenant by the assignee of the lessor against the assignee of the lessee, the plaintiff may give parol evidence of an assignment by the lessee to the defendant.
An assignee of the lessee is not liable to the lessor upon the covenants in the lease, unless he is assignee of the whole estate of the original lessee. *May v. Sheehy*, 135.
2. Drafts drawn by the defendant upon his debtor before attachment, are entitled to priority of payment out of the fund in the hands of the garnishee; although the garnishee has no notice of such drafts until after the attachment served. *King v. Gorsline*, 150.
3. A draft by the defendant upon the garnishee in favor of a third person, before the attachment, is an assignment to the payee, of the amount stated in the draft, and will be preferred to an attachment. *Miller et al. v. Frink et al.* 451.
4. If the guarantor pay the debt he cannot maintain an action against the debtor in the name of the creditor, although he take an assignment of the debt from the creditor, unless, at the time of payment, it was not intended to extinguish the debt, but to assign it to the guarantor. *Brown v. Decatur*, 477.

ATTACHMENT.

1. See ASSIGNMENT, 2. *King v. Gorsline*, 150.
2. Upon attachment of the goods and effects of both and each of two joint debtors, bail must be given for both to release the joint and separate effects. Bail will not be received for one only to discharge his separate goods. *Magee v. Callan*, 251.

ATTACHMENT, (*Continued.*)

3. A witness residing in Virginia cannot be compelled, by attachment, to attend the Circuit Court of the District of Columbia in a criminal cause; by the opinion of Mr. Justice Brockenborough. *Ex parte J. H. Pleasants*, 314.
4. The Circuit Court of the District of Columbia has all the powers which, by law, were vested in the circuit courts of the United States on the 27th of February, 1801; and, among others, the power to send attachments into any other district for witnesses in criminal cases. *United States v. Christiana Williams*, 372.
5. The attaching creditor is not in a better condition than his debtor would have been in if the attachment had not been laid. *Miller and Mackay v. Frink et al.* 451.
6. See ASSIGNMENT, 3. *Ibid.*
7. The Court quashed an attachment issued upon one *non est* returned upon a justice's warrant for a small debt; the defendant being a resident of the district. See the Acts of Maryland, 1791, c. 68, § 1, and 1715, c. 40. *Doyle v. Richards*, 527.
8. An attachment of credits in the hands of the Chesapeake and Ohio Canal Company is sufficiently served by notice to the clerk of the company. *Davidson v. Donovan et al.* 578.
9. Goods distrained in Maryland for rent, and suffered by the landlord to be carried into the District of Columbia, where they were attached for a debt due by the tenant to a third person, may be recovered by the landlord by replevin, notwithstanding the attachment. *Calvert v. Stewart*, 728.
10. If a petition for freedom be filed, and a bill for an injunction to restrain the master from removing the petitioner out of the jurisdiction of the Court, the injunction may be granted on the affidavit of the petitioner; and if the injunction be not obeyed, an attachment may issue on a proper affidavit; and if the party be taken upon the attachment, and brought into court, he will not be discharged until he has given security, as required by the rules and practice of the Court, that the petitioner shall be permitted to attend the trial, &c. *Negro John Thornton v. Irrine Davis*, 500.
11. The Court, upon an attachment for contempt by disobeying an injunction, will not hear witnesses to contradict the affidavit; nor grant a rule to show cause. *Ibid.*
12. The Court will not quash an attachment on account of a *misnomer* in the injunction; nor receive a plea in abatement. *Ibid.*
13. If a witness summoned by a justice of the peace of Washington county to attend before him and testify in a suit for a small debt, fail to attend accordingly, the justice may issue an attachment returnable to the Circuit Court, who will impose the penalty of two and two thirds dollars as required by the eighth section of the Maryland Act of 1791, c. 68. The Court cannot impose a higher fine. *Ex parte John B. Gorman*, 572.

ATTORNEY AT LAW.

Fidelity to his client is one of the first requisites in the character of an honorable practitioner at the bar.

That fidelity requires that he should maintain all the just rights of his client; but it extends no further. It will not justify any attempt to evade the fair operation of the law, or to impede the administration of justice.

A fault on either side of the true line of honorable professional conduct will equally meet the decided reprehension of the Court. *Ex parte G. L. Giberson*, 503.

BAIL.

1. Upon an informal bond given by a marshal, payable to the President of the United States and his successors, instead of to the United States, the Court held the defendant to bail upon a certificate of defalcation from the Treasury Department. *Andrew Jackson v. Simonton*, 12.
2. In a *scire facias* against bail in *detinue*, upon a recognizance by which the bail undertook that his principal if cast in the suit should restore to the plaintiff the slave detained, if to be had; "if not to be had, that he would pay and satisfy the price of her, and such damages as should be adjudged to the said plaintiff, or render his the said defendant's body to prison, in execution for the same, or that he the said" bail "will do it for him," it is a good plea in bar, that no *ca. sa.* had been issued against the principal. *Bernard v. McKenna*, 130.

BAIL, (*Continued.*)

3. See AFFIDAVIT, 2. *Clarke et al. v. Druet*, 142.
4. See AMENDMENT, 2, 3. *Carrington v. Ford et al.* 231.
5. See ATTACHMENT, 2. *Magee v. Callan*, 251.
6. A discharge under the Insolvent Act of the District of Columbia, does not affect the rights of a non-resident creditor, unless the debtor be confined at his suit at the time of the discharge. Special bail will therefore be required notwithstanding such discharge. *Hauptman v. Nelson*, 341.
7. See AFFIDAVIT, 3. *Stettinius v. Orme*, 342.
8. Bail in slander will be required upon the plaintiff's affidavit that the words were maliciously uttered; that the defendant is a transitory person and about to leave the district, and that the plaintiff verily believes that she has suffered damages to a certain amount. *Doyne v. Barker*, 475.
9. When the marshal has arrested a person charged with a misdemeanor, he may take him to a justice of the peace to give bail by way of recognizance for his appearance in Court to answer for the offence; and the marshal is not bound to take the bail-bond himself. A recognizance thus taken is valid. *United States v. Milburn*, 478.
10. In an indictment against a justice of the peace for taking insufficient bail in a criminal case, it is not necessary to state in what respects the bail was insufficient; nor to set out the security taken; nor to aver that the defendant ordered the offender to be discharged from the arrest. *United States v. Robert Clark*, 506.
11. In a case clearly bailable by law, to require larger bail than the prisoner can give, is, in effect, to refuse bail.
The discretion of the magistrate in taking bail in a criminal case, is to be guided by the compound consideration of the ability of the prisoner to give bail, and the atrocity of the offence. *United States v. Richard Lawrence*, 518.
12. The prisoner having been fully committed for trial upon a charge of an assault upon the President of the United States with intent to kill and murder him, the chief judge refused to issue a *habeas corpus* to bring him up for the purpose of examining witnesses to prove his insanity; and for that cause to discharge him from the common jail, "and to secure the public peace by proper restraint." *Ibid.*
13. If the prisoner be acquitted by the verdict of the jury, on the ground of insanity, the Court will remand him to the custody of the marshal, on being satisfied that it would be dangerous to permit him to be at large while under mental delusion. *Ibid.*
14. If the indictment does not describe an indictable offence, the magistrate who takes the bail in the case has a discretion as to the amount of the bail, and no corrupt motive can be imputed to him on account of the smallness of the amount in which the bail is taken.
The act not being illegal, the Court will not permit evidence to be given of a corrupt motive. *United States v. Fleet Smith*, 772.

BALTIMORE AND OHIO RAILROAD COMPANY.

1. The time given by the Act of Congress, March 2d, 1831, c. 84, to extend and construct the Baltimore and Ohio Railroad into and within the District of Columbia, was extended by the Act of February 26th, 1834, c. 11, to another period of four years. The Act of March 3d, 1835, c. 38, is not void because its title misrecites the date of the act to which it is supplementary; nor is it confined to the mere construction of the road; but gives authority also to condemn land for the use of the company; nor is it void because its title purports it to be an act supplementary to an act which expired by its own limitation; it being revived by a subsequent act. *Baltimore and Ohio Railroad Company v. Van Ness*, 595.
2. If the Act of 1831 expired by the limitation contained in its fifth section, it was revived by the Act of February 26th, 1834. *Ibid.*
3. It is not necessary that the jury should be sworn upon the lot to be condemned. It is sufficient if they meet on the lot. *Ibid.*
4. Notice on the 27th of April, that the jury would meet on the land on the 1st of May, to take the inquisition, is sufficient. *Ibid.*
5. The railroad is a road for public use, and land may be taken therefor, upon just compensation being made. *Ibid.*

BANK.

1. Upon the trial of an indictment for stealing a note of the Bank of the United States, it is not necessary that the United States should prove that it was a genuine note of that bank otherwise than by producing the note itself; nor that it was a note of a chartered bank. *United States v. Jane Byers*, 171.
2. If the charter of a bank indebted to the United States expires, the United States have no remedy against the debtors of the bank, if there were no actual assignment to the United States before the expiration of the charter. *United States v. Amos Alexander et al.* 311.
3. The Corporation of Alexandria is authorized to tax the Farmers Bank of Alexandria, and to collect the tax by distress and sale of the goods of the bank. *Farmers Bank v. Fox*, 330.
4. An indorsement to the cashier of a bank is virtually an indorsement to the bank, and may be so declared upon. *Bank of United States v. Davis*, 533.

BANK OF COLUMBIA.

1. A *fi. fieri facias* issued by order of the president of the Bank of Columbia, under the fourteenth section of its charter, bound the land and the goods of the debtor from the time of the delivery of the writ to the marshal, if it bound them at all. *Smith v. Bank of Columbia*, 143.
2. The fourteenth section of the charter of the Bank of Columbia, granted by Maryland, was repealed by the eighth section of the Act of Congress of the 2d of March, 1821, except as to debts contracted with the bank previous to the passing of that act. Notes given after the date of that act, and discounted by the bank for the purpose of applying the proceeds of such discounting to the payment of debts due before the passing of that act are not within the exception in the repealing act. By taking and discounting the new notes the bank relinquished the right to the summary remedy annexed to the old debt. *Ibid.*
3. The clerk had no authority to issue a second, or *alias* writ of *fi. fa.* upon the same order upon which the first was issued. There should have been a new order founded upon a new affidavit, &c. *Ibid.*
4. The clause of the fourteenth section of the charter, which provides that "such executions shall not be liable to be stayed or delayed by any supersedeas, writ of error, appeal, or injunction from the chancellor," was only applicable to such writs of supersedeas, error, and injunction as the debtor himself might attempt to interpose, or as might be interposed by some person who had voluntarily subjected himself to the summary remedy by becoming party to a note expressly made negotiable at the Bank of Columbia.
That clause could only regulate courts established under the authority of Maryland. *Ibid.*

BANKRUPT.

A person claiming title under a deed from commissioners of bankrupt, (under the Bankrupt Law of 1800,) must show their authority, and that their proceedings were regular, &c., as they exercised only a special, limited power; but if the records are destroyed, the next best evidence will be received. *Thomas v. Crutenden*, 71.

BARON AND FEME.

1. A due-bill, made to the wife, during the coverture, and for a consideration accruing during the coverture, is not admissible evidence to support a declaration which avers that the due-bill was made *dum sola*. *Smith & wife v. Clarke*, 293.
2. See ASSAULT AND BATTERY, 9. *United States v. Fitton*, 658.
3. The goods of the wife, are the goods of the husband, and must be so called in an indictment for larceny. The wife kept a millinery shop in Washington, and the husband a tinman's shop in Alexandria; but they lived together; and her shop was not for her separate use. *United States v. Patrick Murphy*, 681.
4. Under the Act of Maryland, 1798, ch. 101, c. 5, § 8, the husband is the administrator of his deceased wife's estate, and may sue for her choses in action not reduced into his possession in her lifetime; although her property had been conveyed in her lifetime, to a trustee, for the sole and separate use and benefit of her, and her executors, administrators, and assigns; she not having assigned the trust-fund in her lifetime, nor disposed of it, by will or deed, executed according to the terms of the trust. *Marshall v. Dorsett*, 696.

BARON AND FEME, (Continued.)

5. If the goods stolen, be charged as the goods of A. B. and if, upon evidence, it appear that A. B. was a *feme covert*, and the goods were the property of her husband, yet if the husband be absent, and not contributing to her support, she keeping house by herself, the Court will not instruct the jury to find the prisoners not guilty. *United States v. Parsons et al.* 726.

BIGAMY.

1. An indictment for bigamy, must be tried in the county in which the last marriage was celebrated. *United States v. Jernegan*, 1.
2. The statute of bigamy, 1 Jac. 1, c. 11, was expressly enacted and declared to be in full force, to all intents and purposes, in Maryland, by the Act of 1706, c. 8, and by the bill of rights of that State, and by the Act of Congress of the 27th of February, 1801, became the law of the county of Washington. *United States v. Jennege*, 118.
3. *Quære*, whether, in a prosecution for bigamy, evidence of a marriage *de facto* is evidence of a marriage *de jure*? *Ibid.*
4. On a conviction of bigamy, the Court may dispense with the burning in the hand. *Ibid.*

BILLS AND NOTES.

1. The Court held, that a note payable on its face at St. Louis, in Missouri, cannot be given in evidence upon a count on a note not so describing it; but that it may be given in evidence upon the count for money had and received; and a motion to appear without special bail was overruled. *Stone v. Lawrence*, 11.
2. Notice to an indorser, if sent by mail, must be directed to the post-office of his place of residence. *Fowler v. Warfield*, 71.
3. Notice of the non-payment of a note for \$1,457, is not notice of the non-payment of a note for \$1,400. *Bank of Alexandria v. Swann*, 136.
4. Notice of the non-payment of a note payable in the Bank of Alexandria, D. C., put into the post-office in Alexandria, on the day after the last day of grace, addressed to the indorser in Washington, D. C., was too late, as the bank closed at three o'clock, P. M., and the mail for Washington did not close in Alexandria, until nine o'clock, P. M. *Ibid.*
5. A note signed "Ford & Chapman," (they being partners and joint contractors,) and payable to the plaintiff, was held not to be admissible evidence to support an averment that the note was made by the defendants, "their own handwriting being thereunto subscribed," (not charging them as partners,) and payable to the plaintiff or order. *Carrington v. Ford et al.* 231.
6. A person, not a party to a note, who takes it up while lying in bank under protest, and takes a receipt as in payment of the balance due upon the note, cannot in an action in the name of the bank for his use, recover of the indorser; but if it was a sale or assignment of the note to him, he may. *Patriotic Bank v. Wilson*, 253.
7. The indorser of a promissory note is discharged by the plaintiff's giving the maker time to pay by instalments. *Cope v. Hunt*, 293.
8. A written promise, absolutely to pay the note of a third person, written at the foot of the note, is an original undertaking, and need not express the consideration. *Fowler v. MacDonald*, 297.
9. A guaranty, of paper payable at the Branch Bank in Washington, does not cover a note made in New York, and not made payable at that bank. *Dobbins et al. v. Bradley*, 298.
10. The plaintiff may, at the trial, after the jury is sworn, strike out the second and third blank indorsements, and fill up the first blank indorsement to himself. *Stettinius v. Myer*, 349.
11. In an action for goods sold at auction for cash, the defendant may set off the plaintiff's note. *Ibid.*
12. The defendant, the acceptor of a bill payable to the plaintiff out of an expected particular fund, received the fund, but paid it to the holder of a subsequent draft by the same drawer;
Held, that the defendant was liable to the plaintiff in an action for money received to his use.
Interest may be given as damages for the non-payment of money received by the defendant to the plaintiff's use; after demand and refusal. *Grammer v. Carroll*, 400.

BILLS AND NOTES, (*Continued.*)

13. An indorser who has been obliged to take up a note, indorsed by two previous indorsers for the accommodation of the maker, may recover the whole amount from either of the two accommodation indorsers. *Mason v. Mason*, 401.
14. A mistake in the date of the note, will not invalidate the notice given to an indorser. *Bank of the United States v. Watterston*, 445.
15. A note at sixty days with interest will not be admitted in evidence to support the averment of a note at sixty days without interest. *United States v. John Lee*, 446.
16. See BANK, 4. *Bank of the United States v. Davis*, 533.
17. In order to prove notice to an indorser who is a clerk of a printing-office, and who has a separate room in which he attends daily to the business of the office, it is competent for the plaintiff to show, by evidence, that a written notice was left at such room, although the indorser was not there at the time. *Bank of the United States v. MacDonald*, 624.
18. After a note has been dishonored and due notice has been given to all the indorsers, the defendant, the last indorser, is not discharged by the holder's taking a new note at sixty days, from a prior indorser for the balance due upon the old note, and giving time to such prior indorser, without the consent of the defendant. *Ibid.*
19. A negotiable note given by the tenant to his landlord, which, when paid, was to be received "on account of rent," is no bar to a distress for the whole rent due before the note became payable, although discounted for the landlord and the proceeds received by him upon his indorsement of the note to a bank. *Griffin v. Woodward*, 709.
20. If a creditor takes a security by deed of trust of personal property for a debt due to him by an indorsed promissory note, and the debtor becomes tenant of the creditor, and rent is in arrear; and the creditor, who is the landlord, distrains the goods conveyed to the trustee as security for the payment of the note; and the same goods are sold under the distress, and the proceeds paid over to the landlord; he is bound to apply the proceeds to the payment of the note, although the goods were found on the premises at the time of the distress; the same being there by the consent of the landlord as security for the note; and these facts are admissible in evidence on the part of the defendant who is sued as indorser of the note; but at law the amount of the set-off cannot exceed the proceeds of the sales actually received by the plaintiff. *Bank of the United States v. Fleet Smith*, 727.

BOND.

1. See BAIL, 1. *Andrew Jackson v. Simonton*, 12.
2. See APPEAL, 4. *Bank of the Metropolis v. Swann*, 139.
3. The marshal of the Southern Judicial District in the Territory of Florida could not lawfully enter on the duties of his office before he had given bond and taken the oath required by the twenty-seventh section of the Judiciary Act of September 24, 1789. *Jackson v. Simonton*, 255.
4. It is not a compliance with the requirement of that act, to give a bond to Andrew Jackson, President of the United States, and his successors in office, not executed by two good and sufficient sureties, inhabitants and freeholders of the district of which he was appointed marshal, and not approved by the judge of that district, and not purporting to be for the faithful performance of the duties of his office by himself and his deputies, and not correctly describing the office to which he had been appointed. *Ibid.*
5. The President of the United States had no authority from the United States to take a bond from a marshal payable to himself and his successors as President. *Ibid.*
6. The judge of the district was the only person designated by the act of Congress to take the bond, and judge of the security, and he could only take it in the name of the United States. *Ibid.*
7. If the marshal was never qualified to enter upon the duties of the office, he could not violate those duties, and his sureties were not liable for any money which the officers of the government might have put into his hands before he was authorized to receive it. *Ibid.*

BOOKS AND PAPERS.

1. It is not too late, after the jury is sworn, to call for the books which the Court has ordered to be produced at the trial. *Wallar v. Stewart*, 532.

BOOKS AND PAPERS, (*Continued.*)

2. If the party, calling for the books, inspect them, he makes them evidence for the other party. *Ibid.*

BRICK-KILN.

1. Under the by-law of the corporation of Washington, D. C., of the 14th of August, 1819, no person or officer was authorized to grant a license to erect or use a brick-kiln in that city. *Ward v. Corporation of Washington*, 232.
2. The continued use of a brick-kiln without license is a single offence, the penalty for which is, by the by-law, to be measured by the number of weeks it is used; and all the weeks elapsed before prosecution must be included in that prosecution: but the by-law is so imperfect that it will not sustain a prosecution in any form. *Ibid.*
3. It is in the discretion of the Court to allow or refuse costs upon the reversal of the judgment of a justice of the peace. *Ibid.*
4. Under the power to prevent nuisances and to superintend the health of the city, the corporation had a right to prohibit the erection and use of brick-kilns without a license. *Ibid.*

BURGLARY.

If a slave, lodging in the house, lifts the latch of his mistress's sleeping-room, in the night-time, and enters with an axe in his hand, with intent to murder her, he is guilty of burglary; and to constitute an attempt to murder, no further act of violence is necessary. *United States v. John Arthur Bowen*, 604.

BY-LAW.

1. A person residing or having real estate in Georgetown, D. C., is bound to take notice of the charter and by-laws. *Corporation of Georgetown v. Smith*, 91.
2. A person indebted for taxes on real estate in Georgetown, and availing himself of the benefit of the ordinance of June 15, 1822, by giving his notes therefor, creates an equitable lien on the real estate, of which a purchaser is bound to take notice, and is liable to pay the taxes with interest, in the same manner as the vendor was bound. *Ibid.*
3. A warrant upon the by-law of the city of Washington of January 12, 1830, § 1, for setting up a faro-table, must state it to be "for the purpose of gaming for money." *Corporation of Washington v. Cooley*, 103.
4. The keeping of a faro-table, contrary to the by-law of the corporation of Washington, of June 12, 1830, is a single offence, although continued for many days. And although the penalty is fifty dollars a day, yet, as the prosecution must be before a single magistrate, whose jurisdiction cannot exceed fifty dollars, no greater sum can be recovered upon any one warrant. A conviction or acquittal upon any such warrant is a bar to all acts of keeping prior to the issuing of such warrant. The day laid in the warrant is not material, so that the time, actually proved, be subsequent to a former prosecution, (if there has been any such,) and before the issuing of the present warrant, and within the time of limitation. If the corporation would avail themselves of the daily penalty, they must issue their warrants daily. *Dixon v. Corporation of Washington*, 114.
5. See BRICK-KILN, 1, 2, 3, 4. *Ward v. Corporation of Washington*, 232.
6. There is no law in the county of Washington, D. C., to justify the commitment of a man to hard labor, by a justice of the peace, for playing at cards, even if he be a free black or mulatto, and unable to pay the fine imposed on him by the justice. *Ex parte Thomas Williams*, 343.
7. The 8th section of the by-law of May 31, 1827, is not, so far as it authorizes a commitment to the workhouse for the non-payment of a fine warranted by the charter, except in the case of the nightly and other disorderly meetings of slaves, free negroes, and mulattoes, who are unable to pay the fine. *Ibid.*
8. By the eighth section of the charter the only persons who may be confined to labor for not paying a fine, are free negroes and mulattoes who are unable to pay such penalty. Confinement to labor is a severe proceeding and should be strictly confined to the case in which alone it is authorized by the charter. The power was not originally given as a substituted punishment in lieu of the penalty, but as the means of obtaining payment of the penalty. In case of inability to pay, he is to give an equivalent in labor. The corporation had no authority to compel a person to labor who was able and refused to pay. The

BY-LAW, (*Continued.*)

by-law which attempts to give authority to a justice to commit the defendant to labor for a refusal to pay is not warranted by the charter.

A commitment under the by-law must charge that the offence was committed by a free black or mulatto. *Ibid.*

9. Fines, penalties and forfeitures under by-laws of the corporation of Washington, not exceeding \$50 are recoverable before a justice of the peace. *Ex parte Julia Reed*, 582.
10. There does not appear to have been given to the corporation of Washington by any of its charters or the amendments thereof, any authority directly to punish any free person corporally, for the breach of its by-laws. It can only impose fines, penalties, and forfeitures, for the violation of its ordinances, to be recovered as debts. The only case in which labor may be added to imprisonment for the non-payment of a fine, is that of a free negro or mulatto who has been convicted of being present at a disorderly meeting and who is unable to pay the fine, for if he is able to pay, it may be recovered by the ordinary process of execution. If unable to pay in money, it was intended by the charter that he should pay in labor; and he could not be forced to labor, unless confined. Hence it was provided that he should be confined to labor instead of a simple imprisonment upon a *ca. sa.* It was not so much intended as a punishment as a means of recovering the penalty. *Ibid.*
11. In all cases of breach of the by-laws, the prosecution is by an action of debt; and the judgment can only be for the fine, penalty, or forfeiture. In ordinary cases the execution to enforce the payment is a *ca. sa.*, *fi. fa.*, or attachment. In the case of the inability of a free negro or mulatto to pay the fine for the offence of disorderly meeting, it may be by commitment to labor for a limited time; the difference is not in the judgment, but in the execution. In all cases the prosecution is for the recovery of the penalty.
A fine or penalty incurred by the breach of a by-law is a debt, and recoverable as such. *Ibid.*
12. The corporation of Washington has authority under its charter to require security for good behavior of persons guilty of grossly indecent language or behavior publicly in the streets, and to cause them to be confined to labor, if they refuse or are unable to give the security required; and the justices of the peace individually have authority to require the security and to commit for want of it; but the indecent language or behavior must be publicly in the streets. That part of the by-law which requires security to be given by persons guilty of simple "profane or indecent language or behavior," is not warranted by the charter, and is void; but so far as it requires security to be given by "disorderly persons," it is valid. *Ibid.*
13. The warrant of commitment should state that the party was required to give the security, the amount of the security required, and for what period of time, so that it might appear that the amount and time were reasonable.
The commitment may be to labor, but not to hard labor. *Ibid.*
14. A member of the board of aldermen of the city of Washington, is not a competent magistrate to convict a person of a violation of the by-laws of the corporation. *Hall v. Corporation of Washington*, 722.
15. A justice of the peace may reject a plea of misnomer, in abatement. *Ibid.*
16. A justice of the peace has jurisdiction of penalties under by-laws, not exceeding \$50. *Ibid.*
17. The corporation of Washington has authority to restrain and prohibit gaming in the city. *Ibid.*
18. An appeal to the Circuit Court of the District of Columbia for the county of Washington lies from the judgment of a justice of the peace, for the penalty of a by-law of the corporation of Washington; although the amount of the penalty be discretionary within certain limits.
That discretion does not deprive the party of his right of appeal. *Corporation of Washington v. Eaton*, 352.
19. The power given by Congress to the corporation of Washington to pass by-laws for the government of the city is not a delegation of the power of exclusive legislation given to Congress by the Constitution of the United States. *Ibid.*
20. The power given by the charter "to prevent and remove nuisances," "and to provide for the prevention and extinguishment of fires," authorized the corporation

BY-LAW (*Continued.*)

- to pass the by-law of March 30, 1813, against any person who shall "fire or shoot a gun, pistol, or other fire-arm, idly or for sport or amusement, within two hundred and fifty yards of any dwelling-house," &c. *Ibid.*
21. A *qui tam* action will not lie on that by-law. *Ibid.*
 22. It is not necessary that the order for the appeal should be under the corporate seal. *Ibid.*
 23. It is not necessary that the justice, who takes cognizance of the case, should be one of those to be designated under the sixth section of the by-law of November 8, 1830. *Ibid.*
 24. It is not necessary that it should appear upon the proceedings before the justice that the by-law had been published five days in some newspaper by authority of the corporation. *Ibid.*
 25. The ten days' notice required by the seventh section of the Act of Congress of March, 1, 1823, was for the benefit of the appellant, not of the appellee. *Ibid.*
 26. See CORPORATION OF WASHINGTON, 5. *United States v. Gorman*, 574.

CERTIORARI.

1. A *certiorari* will lie from the Circuit Court, D. C., to a justice of the peace who is proceeding in a case in which he has no jurisdiction; it will issue upon the affidavit of the defendant. It is the proper writ where a justice of the peace usurps a jurisdiction which belongs exclusively to this Court. If the justice has no jurisdiction in the case, his proceedings are absolutely void; and this Court will proceed to try the cause according to law. *Kennedy v. Gorman*, 347.
2. A *certiorari* will not lie to bring up the proceedings of justices of the peace under the Maryland statute of 1793, c. 43, against tenants holding over. *Lenox v. Arguelles*, 477.
3. Upon the return of a *certiorari*, it appeared that a justice of the peace in Georgetown, D. C., had rendered judgment for the penalty of twenty dollars for selling a lottery ticket without a license from the Corporation of Georgetown. This Court decided that if the business of vending lottery tickets was lawful, the corporation had no power to restrain it; if unlawful, no power to license it. *Nicholls v. Corporation of Georgetown*, 576.

CHALLENGE.

Peremptory challenge allowed upon an indictment for stealing a slave in Alexandria, D. C. *United States v. Summers*, 334.

CHANGE OF VENUE.

The Court refused to rescind the order for change of venue on account of insufficiency of the affidavits upon which it was granted. *Kounsalaer v. Clarke*, 98.

CHEAT.

The Court refused to quash an indictment for a conspiracy to cheat by selling a free negro as a slave. *United States v. Spalding et al.* 616.

CHESAPEAKE AND OHIO CANAL COMPANY.

1. It is not necessary that an inquisition taken under the charter of the Chesapeake and Ohio Canal Company should contain the names of such jurors as were summoned but not sworn. The land condemned is sufficiently described in the inquisition by reference to the description in the warrant. *Chesapeake and Ohio Canal Co. v. Bimrey*, 68.
2. Where several warrants have been issued and returned with inquisitions for condemning land, and each inquisition refers to the warrant returned therewith, it is competent to prove by parol which warrant is applicable to each inquisition. *Chesapeake and Ohio Canal Co. v. Union Bank*, 75.
3. The jury ought to ascertain and describe the bounds of the land by them valued, and the quality and duration of the interest and estate in the same. *Ibid.*
4. The canal company is the sole judge what interest in the land will be necessary for their operations; and the jury are to value such interest as the company shall require. *Ibid.*
5. The charter does not require notice to the party whose lands are sought to be condemned, and therefore the inquisition need not state that such notice has been given; but it ought, in fact, to be given, if the party be, at the time, in the county. *Ibid.*
6. It is not necessary that the inquisition should state the value of the land sepa-

CHESAPEAKE AND OHIO CANAL COMPANY, (*Continued.*)

- rately from the damages. The benefit to the owner may be as well set off against the value of the land as against the damages. *Ibid.*
7. *Quere*, whether it be necessary that the jury should ascertain the bounds of the land, upon the land itself by metes and bounds? *Ibid.*
 8. In authorizing the condemnation of lands for a highway, the United States only claim to exercise the power which belongs to every sovereign, to appropriate private property to public use. *Ibid.*
 9. An inquisition, condemning more land than can be reasonably required for the use of the company; or if the bounds are not ascertained with certainty, will be set aside by the Court. *Chesapeake and Ohio Canal Co. v. Mason*, 123.
 10. The original subscribers to the Chesapeake and Ohio Canal Co., are bound by the alterations of the charter made by subsequent acts of legislation, with the consent of the corporation. *Chesapeake and Ohio Canal Co. v. Robertson*, 291.
 11. If a contract with the Chesapeake and Ohio Canal Company be declared, by them, "abandoned," for non-compliance with the terms thereof, according to a right reserved to the company by the contract, the contractors do not thereby forfeit the money which they have earned up to the time of abandonment, except the 20 per cent. reserved as security for the execution of the work contracted for; although by the terms of the contract, upon the contract being declared "abandoned," it was agreed that the company should be exonerated "from every obligation thence arising;" and that the reserved percentage on the contract price should become the property of the company to indemnify them "for such breach of contract." *Miller et al. v. Frink et al.* 451.
 12. See ATTACHMENT, 8. *Davidson v. Donovan*, 578.
 13. Under the contract between the plaintiff and the Chesapeake and Ohio Canal Co., the final estimate of the engineer, of the amount and value of the work done by the contractor, was to be conclusive, unless objected to within twenty days. The plaintiff, within the twenty days, objected to the estimate as to price, but not as to the quantity of work done. *Held*, that he cannot, after the twenty days, object to the estimate as to the quantity of the work done. It is conclusive between the parties. *Carothers v. Chesapeake and Ohio Canal Co.* 698.

CLERK.

If a case be set for hearing as to some of the defendants, and as to them brought upon the docket of the Court, and continued at the rules as to other defendants who are absent and have not answered, the clerk has a right to charge his fees for the continuances at the rules. *Ex parte E. J. Lee*, 197.

COMMITMENT.

1. A commitment not stating, on its face, any offence, is not evidence of a commitment for felony, although written on the back of a warrant of arrest charging a felony, but not referring to it. *United States v. Addison Brown*, 333.
2. No person can be detained upon a commitment which does not show sufficient cause upon its face. *Ex parte Thomas Williams*, 343.

COMPENSATION.

See AGENT, 1. *United States v. Nourse*, 151.

CONFESSION.

If a person arrested for larceny, makes a confession to the officer, as to that larceny, under a promise by the officer, to do what he could for him, if he would tell where the stolen goods were; and afterwards before the magistrate, without any new promise or threat, or question, makes a confession of a different larceny; such latter confession is admissible evidence against the party upon his trial for such larceny. *United States v. Kurtz et al.* 682.

CONSPIRACY.

1. See CHEAT. *United States v. Spalding et al.* 616.
2. The time and place of conspiracy must be stated in the indictment. *United States v. Soper et al.* 623.

CONSTABLE.

See ARREST, 2. *United States v. Goure*, 488.

CONTEMPT.

1. An indictment for using contemptuous language to a magistrate in the exercise of his office, should set forth the words spoken; and the day and month; and that the magistrate was in the discharge of his official functions. *United States v. Beale*, 313.
2. See ATTACHMENT, 10, 11. *Thornton v. Davis*, 500.
3. It is a contempt of court, punishable under the Act of Congress of March 2, 1831, "declaratory of the law concerning contempts of court," to call another a liar, openly in the presence of the court, while in session, and in the hearing of the officers of the court; and an assault and battery committed in the hall of entrance into the court-room, separated from it only by a door without panels, and covered with cloth, was "either in the presence of the court, or so near thereto, as to obstruct the administration of justice." *United States v. Hiram S. Emerson*, 188.

CONTRACT.

1. A person who becomes a member of a corporation, is bound to know the obligations which he thereby incurs. Those obligations are matters of law resulting from the construction of the charter. If both parties were equally mistaken as to that construction, it is no ground in equity or law for setting aside the objection of the contract. *Chesapeake and Ohio Canal Co. v. Dulany*, 85.
2. Sales at public auction are not within the statute of frauds. *Arden v. Brown*, 121.
3. The statute of enrolment of conveyances, 1766, c. 14, relates to estates at law only, not to the transfer of equitable interests. A contract to sell land, or an equitable interest in land, is not void for want of acknowledgment and enrolment. *Ibid.*
4. A parol agreement among the purchasers at a public sale, is void under the statute of frauds. *Ibid.*
5. It is competent for the defendant, in an action upon a special contract in writing, not under seal, to prove a parol condition not stated in the written contract. *Corcoran v. Dougherty*, 205.
6. If there are mutual promises not dependent on each other, the omission to state, in the declaration, performance of that made by the plaintiff, is cured by the verdict. *Ibid.*
7. The plaintiff who has completed the work according to his sealed contract, may, in assumpsit, recover the balance due to him, although he had covenanted to receive corporation stock in payment, and had not demanded payment in stock, before bringing his action. *Hallihan v. Corporation of Washington*, 304.
8. See CHESAPEAKE AND OHIO CANAL CO. 11. *Miller v. Frink*, 451.
9. *Id.* 13. *Carothers v. Chesapeake and Ohio Canal Co.* 698.

COPY.

1. The record copies in the books of land records of the Circuit Court, D. C., may be read in evidence, without proving the execution or loss of the original deeds. *Bank of the United States v. Benning*, 81.
2. An absolute deed of goods and chattels, need not, under the Virginia law, be recorded; and a record copy is not evidence. *Negro Kitty Lemon v. E. Bacon*, 466.

CORPORATION.

1. See CONTRACT, 1. *Chesapeake and Ohio Canal Co. v. Dulany*, 85.
2. See BY-LAW, 1. *Corporation of Georgetown v. Smith*, 91.

CORPORATION OF ALEXANDRIA.

The corporation of Alexandria is authorized to tax the Farmers Bank of Alexandria, and to collect the tax by distress and sale of the goods of the bank. *Farmers Bank of Alexandria v. Fox*, 330.

CORPORATION OF GEORGETOWN.

1. The corporation of Georgetown, D. C., in the year 1826, had a right to sell real property in that town for corporation taxes due thereon in the years 1819, 20, 21, and 22, as well as for taxes due thereon in the years 1813 to 1819 inclusive. *Corporation of Georgetown v. Bank of the United States*, 176.
2. The power, to regulate streets, given to the corporation of Georgetown by the Act of 1805, applies only to streets opened or extended by virtue of that act.

CORPORATION OF GEORGETOWN, (*Continued.*)

The inquest must be taken before a magistrate or officer. The justice must certify that he summoned the jurors, and that they were sworn. The jurors must certify that they made the inquest, and the party to be affected by the inquest must be notified.

A subsequent inquisition is no bar to the plaintiff's special action upon the case for a cause of action which accrued before the inquisition. *Wright v. Corporation of Georgetown*, 534.

3. See CERTIORARI, 3. *Nicholls v. Corporation of Georgetown*, 576.

CORPORATION OF WASHINGTON.

1. See COMMITMENT, 2. *Ex parte Thomas Williams*, 343.

2. See BY-LAW, 6, 7, 8, 9. *Ibid.*

3. See APPEAL, 6, 7. *Corporation of Washington v. Eaton*, 352.

4. See BY-LAW, 18 to 25 inclusive. *Ibid.*

5. The power given to the corporation of Washington city, by its charter of 1820, "to provide for licensing, taxing, and regulating" "venders of lottery tickets;" and the power given by the same section of the same charter "to restrain or prohibit" "lotteries;" and the by-laws of January 4, 1827, and July 12, 1831, seem to have repealed the second section of the Act of Maryland of 1792, c. 58, so far as it was in force in the city of Washington. *United States v. Gorman*, 574.

6. See BY-LAW, 9 to 13 inclusive. *Ex parte Julia Reed*, 582.

7. See ALDERMAN. *Hall v. Corporation of Washington*, 722.

8. See BY-LAW, 14, 15, 16, 17. *Ibid.*

COSTS.

1. If the plaintiff's surety for costs, in *scire facias*, die pending the suit, the Court, on motion, will require new security, although the administrator of the former surety may have assets. *Duval v. Wright*, 169.
2. The person, for whose use the suit is entered of record, although liable to the defendant for his costs, is not, thereby, liable to the marshal for his poundage upon a *ca. sa.* *Ringgold v. Hoffman*, 201.
3. It is in the discretion of the Court to allow or refuse costs upon the reversal of the judgment of a justice of the peace. *Ward v. Corporation of Washington*, 232.
4. Where a new trial is granted, on payment of costs, although the general rule is, that if the costs are not paid by the second day of the term next after granting the new trial, the judgment shall be entered up on the verdict; yet, under particular circumstances, the Court will, at that term, set aside the judgment, and permit the cause to be tried. *Howe v. McDermott*, 711.

CRUELTY.

1. The owner of a slave who beats him cruelly, and exposes him, so beaten, to public view, is guilty of a misdemeanor at common law. *United States v. R. B. Lloyd*, 470.
2. Public cruelty to a cow, and beating her to death, in or near a public street in Washington, D. C., is an indictable offence at common law, as a public nuisance. *United States v. Daniel Jackson*, 483.
3. It is an indictable offence, to cruelly beat the slave of another, in the public highway, and leave her there exposed to public view. *United States v. George Cross*, 603.

DAMAGES.

1. See ASSAULT AND BATTERY, 1. *Conner v. Cockerill et al.* 3.
2. See CHESAPEAKE AND OHIO CANAL CO. 6. *Chesapeake and Ohio Canal Co. v. Union Bank*, 75.
3. If the husband does not die seized, the widow is no more entitled to damages in equity, for the non-assignment of her dower, than she is at law. *Alexander v. Selden*, 96.
4. Dower will be assigned in equity where there has been a parol partition by tenants in common; and damages will be awarded, from the time of the demand, if the husband died seized. *Nutt v. Mechanics Bank et al.* 102.
5. See APPEAL, 4. *Bank of Metropolis v. Swann*, 139.
6. If cattle be impounded for damage feasant, the badness of the plaintiff's fence is

DAMAGES, (Continued.)

no justification of pound-breach; but may be given in evidence in mitigation of damages. *Young v. Hoover*, 187.

7. See **BILLS AND NOTES**, 12. *Grammer v. Carroll*, 400.

DEED.

1. See **COPY**, 1. *Bank of the United States v. Benning*, 81.
2. An original deed, which had been recorded in the land-records, under a decree in chancery, under the Maryland Act of 1792, c. 41, § 3, may be adduced in a subsequent action of ejectment, and identified as the deed thus ordered to be recorded, although it did not continue to remain on file in the suit in which it was ordered to be recorded. *Ibid.*
3. Parol evidence may be given, that the persons who took and certified the acknowledgment of a deed, were, at the time of taking and certifying the same, justices of the peace; and it is not necessary that their official character should appear on the face of their certificate of acknowledgment. *Ibid.*
4. The parties to deeds are estopped to deny the truth of the recitals therein; and if the deeds are offered only to show the transmission of the legal title, the truth of the recitals need not be proved *aliunde*. *Ibid.*
5. If a deed of bargain and sale be made by a trustee, the legal estate passes, whether the terms of the trust are complied with or not. For if the bargainee takes with notice, he himself stands as trustee in place of the bargainer; if without notice, and for valuable consideration, he takes an absolute title; for a trustee conveys by virtue of the legal estate vested in him, and not by virtue of a power. *Ibid.*
6. A deed of bargain and sale, by a person not in possession, is void. *Ibid.*
7. If, by the terms and nature of the deed, the possession of the property is to accompany and follow the deed, and it does not, but remains with the grantor, such deed is fraudulent in law, and void as to the creditors of the grantor; although the deed should be acknowledged and recorded according to the Maryland law of 1729, c. 8, § 5; but such deed is void only against creditors of the grantor, who thus retains the possession, inconsistently with the terms and nature of the deed. *Smith v. Ringgold*, 124.
8. A deed, executed in Massachusetts, by one of the grantors, on the 1st of February, 1810, and by the other grantor on the 10th of August, 1810, in Georgetown, D. C., is to be considered as dated when the last grantor executed it, and if recorded within six months after that date, is recorded in due time. *Kurtz v. Hollingshead*, 180.
9. A widow is not barred by her acknowledgment of a deed not recorded. *Ibid.*
10. In case of sale under a creditors' bill, the heirs are entitled to the rents and profits from the death of their ancestor until the sale. *Ibid.*
11. A creditor, who seeks to set up a lost deed of trust, not recorded in due time, must come in *pari passu* with the other creditors. *Ibid.*
12. See **COPY**, 2. *Lemon v. Bacon*, 466.
13. A deed from a daughter was set aside, both on the ground of the relation between the parties, and the conveyance being, of a reversion, to the tenant for life, without valuable consideration. *Pye v. Jenkins*, 541.

DEPOSITION.

1. Notice of taking a deposition under the Act of 1789, directed to the party himself, may be served on his attorney at law. *Barrell v. Limington*, 70.
2. Notice on the 28th of December, to take a deposition in Alexandria on the 29th, is not too short; all the parties residing in that town. *Atkinson v. Glenn*, 134.
3. The Court will not order a commission, to take the deposition of a witness residing in Maryland, within one hundred miles of the place of trial, because this Court has authority to compel the attendance of the witness. *Gustine v. Ringgold*, 191.

DETINUE.

1. Detinue, is an action in form, *ex contractu*, and not *ex delicto*; and is not, on that ground, to be excluded from the jurisdiction of a justice of the peace. *Maynardier v. Duff*, 4.
2. The justices of the peace in Alexandria county, have jurisdiction in cases of detinue. *Ibid.*

DETINUE, (Continued.)

3. In a *scire facias* against bail in detinue, it is a good plea in bar, that no *ca. sa.* had been issued against the principal. *Bernard v. McKenna*, 130.

DEVISE.

A devise, by the testator to his wife, "during her widowhood, or in other words, while she should bear his name, but in case she should choose to marry again, then it was his wish that the whole of his estate, both real and personal, should be given to his daughter and her heirs forever;" is a devise to the widow during widowhood, with a vested remainder to the daughter in fee. *Farmers Bank v. Hooff et al.* 323.

DISCONTINUANCE.

A replevin, discontinued at March term, 1834, by negligence of the clerk, was reinstated at March term, 1835. *McDermott v. Nailor*, 527.

DISCOVERY.

A bill of discovery, is an ancillary process, and not for original relief. In order to obtain ultimate relief in equity, there must be other ground than the mere defect of evidence in an action at law. *Breckenridge v. Peter*, 15.

DISFIGURING.

Biting off an ear, is not disfiguring, within the Virginia Act of December 17th, 1792. *United States v. Askins*, 98.

DISORDERLY HOUSE.

1. It is an indictable offence, at common law, to keep a common gaming-house, and for lucre and gain to cause idle and evil-disposed persons to come and play together there, and to game for divers large and excessive sums of money, to the common nuisance of the citizens of the United States. *United States v. Jacob Dixon*, 107.
2. Upon an indictment for keeping a disorderly house, and for keeping a bawdy-house, the United States cannot give evidence of the general reputation of the house; nor of the general reputation of the defendants. *United States v. Jourdine*, 338.
3. Upon a count for keeping a disorderly house, charging that the defendants suffered persons of ill-fame to come together, &c., evidence may be given of the general reputations of such persons; and the same evidence is admissible upon a count for keeping a bawdy-house. *United States v. Stevens*, 341.
4. Upon an indictment for keeping a disorderly house, and for keeping a bawdy-house, the United States cannot give evidence of the general character of the defendant. *United States v. Warner*, 342.
5. Upon an indictment for keeping a house of ill-fame, evidence of ill-fame of the defendant herself cannot be given. *United States v. Nailor*, 372.
6. Upon an indictment for keeping a house of ill-fame, evidence may be given of the ill-fame of its inhabitants, but the witness will not be required to disclose their names.

The Attorney of the United States will not be permitted to prove that his own witness is a woman of ill-fame. *United States v. McDowell*, 423.

7. Facts stated from which the jury may find the defendant guilty of keeping a disorderly house. *United States v. Elder*, 507.
8. An indictment, charging that the defendant kept a certain gaming-table, called a faro-bank, is not sufficient under the Penitentiary Act of the District of Columbia. *United States v. Milburn*, 719.
9. The keeper of a room in which common gaming is carried on, for his lucre and gain, and under his management and control, is guilty of keeping a disorderly house; and evidence of his keeping a faro-bank therein, may be given under the count for keeping a disorderly house; but an indictment, for keeping a common disorderly house, is not supported by evidence of keeping a room in which gaming is carried on. It is not necessary to prove that the defendant was also the keeper of the house; nor to prove other disorderly conduct. *Ibid.*

DISTRESS.

1. See **BANK**, 3. *Farmers Bank v. Fox*, 330.

DISTRESS, (Continued.)

2. If the landlord evict the tenant from part of the premises, he cannot distrain for the rent. If he is entitled to an apportionment of the rent, he may maintain an action for use and occupation; but if he is not entitled to an apportionment of the rent, he has no remedy. *Baker v. Jeffers et al.* 707.
3. See **BILLS AND NOTES**, 19. *Griffin and Tilley v. Woodward*, 709.
4. See **ATTACHMENT**, 9. *Calvert v. Stewart*, 728.

DOWER.

1. See **DAMAGES**, 3. *Alexander v. Selden*, 96.
2. *Id.* 4. *Nutt v. Mechanics Bank*, 102.
3. A widow is not barred by her acknowledgment of a deed not recorded. *Kurtz v. Hollingshead*, 180.

EJECTMENT.

1. When the plea, in ejectment, is not guilty, or defence on title, the defendant may give evidence of possession without warrant and location. *Bank of United States v. Benning*, 81.
2. See **AMENDMENT**, 1. *McDaniel v. Wailes*, 201.
3. A purchaser under a deed of trust need not give notice to quit, before bringing ejectment against the grantor of the trust-deed.
Notice to quit is not necessary where the relation of landlord and tenant does not exist.
If, by the terms of the deed of trust, the grantor was to hold the possession until a sale should be made under the deed, his tenancy ceases upon the sale, and notice to quit is not necessary. *Waters et al. v. Butler*, 371.

ELECTION.

An action cannot be maintained upon a promissory note given upon a wager that Andrew Jackson would get the electoral vote of Kentucky for the office of President of the United States; because the consideration is illegal, (although the parties themselves were not qualified to vote at the election); and because such a contract tends to draw in question the validity of the election of the chief magistrate of the nation. *Denney v. Elkins*, 161.

EMBEZZLEMENT.

If a clerk embezzle the goods of his employer, and convert the same into money and deposit it in a bank to his own credit, injunction will not lie to restrain him from disposing of it, although he has no other property and is about to leave the district, no debt being positively averred so as to justify a *ne exeat*. *McKenzie et al. v. Cowing*, 479.

EQUITY.

1. See **DISCOVERY**. *Breckenridge v. Peter*, 15.
2. The value of professional services may, in equity, be set off against a single bill, if such was the understanding of the parties. *Ashton v. McKim et al.* 19.
3. If the proceedings in equity have not been recorded at full length, the original papers, documents, and docket entries may be adduced and used in court as constituting the record of the case. *Bank of the United States v. Benning*, 81.
4. See **DEED**, 2, 3, 4, 5, 6. *Ibid.*
5. A person indebted for taxes on real estate in Georgetown, D. C., and availing himself of the benefit of the ordinance of June 15th, 1822, by giving his notes therefor, creates an equitable lien on the real estate of which a purchaser is bound to take notice, and is liable to pay the taxes with interest in the same manner as the vendor was bound. *Corporation of Georgetown v. Smith*, 91.
6. A purchaser, at a sale under judgment and execution, takes only the right of the debtor at the time of the judgment.
A judgment at law does not overreach a prior equity of a third person *bonâ fide* acquired for valuable consideration. *Ibid.*
7. See **DAMAGES**, 3. *Alexander v. Selden*, 96.
8. *Id.* 4. *Nutt v. Mechanics Bank*, 102.
9. See **CONTRACT**, 2, 3, 4. *Arden v. Brown*, 121.
10. A trustee, who is directed by the deed of trust to sell the property and invest the proceeds in productive funds, and fails to do so, is liable to pay interest. *Nicholson v. McGuire*, 194.

EQUITY, (*Continued.*)

11. A receipt, given by a young man just arrived at full age, for a certain sum, as his share of his father's estate, is not a bar, in equity, to his demanding the interest and dividends upon the fund to which he was entitled by the terms of the deed of trust. *Ibid.*
12. See ACCOUNT, 1. *United States v. Fitzgerald*, 203.
13. A pursuer who disburses money, for the United States, which it is not his duty, as pursuer, to disburse, is, in equity, entitled to a reasonable compensation therefor. *Ibid.*
14. Under the third section of the Virginia Statute of Usury every debtor has a right to go into equity, alleging usury, whether he can, or cannot prove it without the aid of the defendant's answer, and although judgment at law may have been rendered against him. *Swann v. Brown*, 247.
15. See BANK, 2. *United States v. Amos Alexander et al.* 311.
16. Several defendants who have no connection with each other in interest, in estate, or in contract, and against whom jointly the plaintiffs have no cause of suit either at law or in equity, cannot be joined in one bill. *Ibid.*
17. In a suit in equity to foreclose a legal mortgage, the Court will not, before answer, grant an injunction to prevent the mortgagor, in possession, from receiving the rents and profits; nor will they appoint a receiver, the defendant being in no default for not answering. *Oliver v. Decatur*, 458.
18. The defendant may, at any time before the bail is taken for confessed, plead, demur, or answer; and the plaintiff is to pursue the same course as if the plea, demurrer, or answer had been filed before the expiration of the three months limited, for answer, by the rules of the Court.. *Ibid.*
19. See EMBEZZLEMENT. *McKenzie v. Cowing*, 479.
20. See DEED, 13. *Pye v. Jenkins*, 541.
21. If the answer be filed in term-time, the Court will hear a motion to dissolve the injunction at any time upon reasonable notice. Three days notice, left at the office of the complainant's solicitor in his absence from town, is reasonable. *Caldwell v. Walters*, 577.
22. A defendant, who appears to a bill of revivor, is not entitled to the benefit of the sixth and tenth rules of practice established by the Supreme Court of the United States for the circuit courts. But the Court will order the suit to stand revived unless cause be shown to the contrary in ten days. *Oliver's Executor v. Susan Decatur*, 592.
23. The commissions, of a supercargo of a sequestered cargo, are a charge upon the proceeds of sales, and are not included in the indemnity to be granted by the sequestering government. The indemnity stands in the place of the proceeds of sale, and the commissions are a charge upon that indemnity. *Stewart's Administrator v. Callaghan, et al.* 594.
24. A justice of the peace has authority to administer an oath to an answer in chancery. *United States v. Cowing*, 613.
25. Upon a creditors' bill against the surviving partner of a mercantile firm, a receiver may be appointed. *Dick et al. v. Laird*, 667.
26. This Court, when sitting in a case of partition of an intestate real estate under the Maryland Law of Descents, (1786, c. 45,) sits as a county court of common law, exercising a summary jurisdiction given by the statute, and has no authority to grant relief as a court of equity. *Shaw v. Shaw et al.* 715.
27. In making sale of the real estate of an intestate, where it will not admit of a specific division among the heirs, according to the Maryland Act, 1786, c. 45, § 8, the commissioners may annex to the terms of sale, a condition that if the purchaser shall fail to comply with the terms of sale within a certain number of days, the property shall be resold at his risk; and it is not necessary that the first sale should have been ratified by the Court, in order to charge the first purchaser with the loss upon the resale. *Ibid.*
28. If the husband of one of the heirs is a delinquent purchaser, and liable for the loss upon the resale, his wife's share of the estate cannot be charged with the loss. But if one of the heirs becomes a purchaser and fails to comply with the terms of the sale, his share of the purchase-money may be applied to make good the loss, although he may, after his default, have assigned his share of the estate, or of the purchase-money to a stranger; the assignee must take it *cum onere*. *Ibid.*

EQUITY, (Continued.)

29. The commissioners, appointed under the Maryland Act of Descents to sell the real estate of an intestate, are liable to be made defendants to a bill in equity, and may be compelled to answer and account for the money which they have received. *Ibid.*

ERROR.

See AGENT, 2. *Bank of Washington v. Bank of the United States*, 86.

ESTOPPEL.

See DEED, 4. *Bank of the United States v. Benning*, 81.

EVICITION.

See DISTRESS, 2. *Baker v. Jeffers et al.* 707.

EVIDENCE.

1. In an action upon the case for receiving the plaintiff's slave in Virginia and bringing him into the District of Columbia, it is not necessary to prove that the defendant knew the slave to be the slave of the plaintiff, although the *scienter* be averred in the declaration.
Difference between the enticing of a servant and the abduction of a slave. In an action for enticing the plaintiff's slave from the service of the plaintiff, knowing him to be the plaintiff's slave, the *scienter* must be proved. *Stanback v. Waters*, 2.
2. See BILLS AND NOTES, 1. *Stone v. Lawrence*, 11.
3. An official copy of a mortgage of real estate in Washington, D. C., is sufficient evidence of the existence of the original mortgage and of the debt due thereon. *Beall's Executors v. Dick et al.* 18.
4. Upon the plea of property in the defendant the burden of proof is on the plaintiff. *Williamson v. Ringgold*, 39.
5. See DEPOSITION, 1. *Barrell v. Limington*, 70.
6. See BANKRUPT. *Thomas v. Cruttenden*, 71.
7. See EQUITY, 3. *Bank of the United States v. Benning*, 81.
8. See COPY, 1. *Ibid.*
9. See DEED, 2, 3, 4, 5, 6. *Ibid.*
10. Evidence of the declaration of another person that he was the guilty person, cannot be given. *United States v. Miller*, 104.
11. Evidence that the defendant dealt the cards at faro, is *prima facie* evidence that he kept the house. *Ibid.*
12. Upon the general issue in *trespass quare clausum fregit*, where the plaintiff relies upon possession without title, the defendant may show, by evidence, that the close which he broke was not the plaintiff's close. *Reynolds v. Baker*, 104.
13. In replevin, the defendant, a constable, (who had seized the goods of the plaintiff, in execution, as the goods of Harrington,) was permitted to testify for himself, upon being indemnified by the plaintiff in the execution. *Hilton v. Beck*, 107.
14. *Quære*, whether, in a prosecution for bigamy, evidence of a marriage *de facto* is evidence of a marriage *de jure*. *United States v. Jenneyen*, 118.
15. See BANK, 1. *United States v. Jane Byers*, 171.
16. Two witnesses are necessary to a deed of manumission, under the Maryland law of 1796, c. 67, § 29. *Negro Samuel v. Childs et al.* 189.
17. See DEPOSITION, 3. *Gustine v. Ringgold*, 191.
18. See CONTRACT, 5. *Corcoran v. Dougherty*, 205.
19. Upon the trial of an indictment, under the 11th section of the Penitentiary Act for the District of Columbia, for uttering as true a counterfeited bank-note, it is not necessary that the note given in evidence, should correspond in words and figures with the note set out in the indictment, with the following averment, namely, "which said false, forged, and counterfeited note is as follows, namely," &c., setting out the note *verbatim et literatim*, with all the words, letters, figures, and numerals upon the face of the note.
But if the forged note be lost, after the indictment found, and before the trial, the jury must be satisfied that it corresponded with that set out in the indictment, in the names of the cashier and president, so far as that there was not, in the one, any letter added or omitted which would vary the sound of the name, and that the note which was passed, had upon its face the letters "No."

EVIDENCE, (*Continued.*)

- prefixed to the number 15,402, as is set forth in the indictment. *United States v. Edward Hall*, 229.
20. See **BILLS AND NOTES**, 5. *Carrington v. Ford et al.* 231.
21. See **BARON AND FEME**, 1. *Smith and Wife v. Clarke*, 293.
22. The appraisement made at the time of levying the distress, is *prima facie* evidence of the value of the goods distrained. *Semmes v. Sprigg*, 292.
23. Upon an indictment for perjury in this Court, it is not necessary to produce a copy of the record of this Court in the cause in which the perjury was committed. The Court is presumed to know its own record. The record exists, although not reduced to writing in full; and the record is what it ought to be, when correctly extended from the minutes. *United States v. Erskine*, 299.
24. In a prosecution for perjury, it is only necessary to prove so much of the testimony of the witness as relates to the particular fact on which the perjury is assigned. *Ibid.*
- *25. Comparison of the handwriting, is not evidence to prove forgery. Witnesses skilled in handwriting, will not be permitted to give their opinion, upon inspection of the papers, whether the forgery was done by the defendant. *United States v. Prout*, 301.
- [26. Where the witness has acquired a knowledge of the handwriting of the prisoner, by having often seen him write, &c., it is competent for him to compare the paper in question, with the genuine handwriting of the prisoner, and to state his belief arising from both sources. *United States v. Larned*, 312.
27. The dying declarations of the deceased, made in contemplation of death, may be given in evidence. *United States v. Taylor*, 338.
28. Upon newly-discovered evidence, a new trial was granted, after conviction of murder; and the *venue* was changed. *Ibid.*
29. See **DISORDERLY HOUSE**, 2. *United States v. Jourdine*, 338.
30. *Id.* 3. *United States v. Stevens*, 341.
31. *Id.* 4. *United States v. Warner*, 342.
32. Upon the plea of no rent-arrear, in replevin, the whole burden of proof is on the party pleading it. *Hungerford v. Burr*, 349.
33. See **DISORDERLY HOUSE**, 5. *United States v. Nailor*, 372.
34. See **ACCOUNT**, 2, 3, 4, 5, 6, 9. *United States v. Kuhn*, 401.
35. See **DISORDERLY HOUSE**, 6. *United States v. McDowell*, 423.
36. A record-copy of a deed of emancipation, may be given in evidence by the petitioner, upon the trial of a petition for freedom, without producing the original, or accounting for its non-production. *Thomas v. Magruder*, 446.
37. See **BILLS AND NOTES**, 15. *United States v. Lee*, 446.
38. *Quere*, whether a payment after suit brought, can be given in evidence upon the general issue of non-assumpsit. *Deale v. Krofft*, 448.
39. No prescription runs against a public right, nor is the possession and use for 20 years evidence of a grant from the United States. *Pierson v. Elgar*, 454.
40. An absolute deed of goods and chattels, in Alexandria, D. C., need not be recorded; and a record-copy is not evidence. *Negro Kitty Lemon v. Bacon*, 466.
41. Upon an indictment for forgery, a person interested in setting aside the instrument forged, is not a competent witness to prove the forgery. *United States v. Anderson*, 476.
42. Evidence will not be admitted that the witness is a common prostitute, to discredit her testimony. The question must be confined to her general reputation for veracity, and whether from his knowledge of that general reputation, he would believe her upon oath. *United States v. Masters*, 479.
43. At the request of the prisoner's counsel, the Court will ask each juror as he comes to be sworn, whether he has formed and delivered any opinion as to the guilt of the prisoner upon the indictment. *United States v. Woods*, 484.
44. On a trial for murder, the declarations of the deceased, not made *in extremis*, or with a settled conviction that he is about to die, cannot be given in evidence. *Ibid.*
45. If one of the witnesses, who have been ordered to be taken out of court during the examination of other witnesses, remains in court in violation of the order, the Court will not permit him to be examined. *Ibid.*
46. The Court will not order the United States witnesses to be sent out of court, after they have been examined, and while the prisoner's witnesses are under examination. *Ibid.*

EVIDENCE, (*Continued.*)

47. The Court will not receive parol evidence of a conviction of larceny in Maryland, to disqualify a witness.
If, upon cross-examination, he admit the fact, but states that he was pardoned upon condition of leaving the State, these facts only go to his credit. *Ibid.*
48. A witness, who, after his examination, remains in court and hears the testimony of the other witnesses, may be examined again to rebut the defence set up by the prisoner. *Ibid.*
49. See ATTACHMENT, 11. *Thornton v. Davis*, 500.
50. Facts from which the jury may find the defendant guilty of keeping a disorderly house. *United States v. Elder*, 507.
51. What was said in the presence of the prisoner before the examining magistrate, and to which he made no reply, cannot be given in evidence against him. *United States v. Brown*, 508.
52. See BOOKS AND PAPERS, 1, 2. *Waller v. Stewart*, 532.
53. If a witness is protected by the act of limitations, he is a competent witness without a release from the party to whom he was liable. *Ibid.*
54. A memorandum in the handwriting of a deceased note-clerk of a bank, that he had delivered a certain notice, may be read in evidence in favor of the bank. *Bank of the United States v. Richard Davis*, 533.
55. Upon a trial for murder, evidence will not be admitted that another person confessed himself to be the murderer. *United States v. McMahon*, 573.
56. A person conscientiously opposed to capital punishment, was found "not indifferent" by the triors. *Ibid.*
57. Upon a joint indictment against two defendants, they have no right to be tried separately; and neither of them can be examined as a witness for the other, unless there be no evidence against one; in which case, the jury may acquit him, and then he may be examined for the other defendant. *United States v. Davidson et al.* 576.
58. A person, to the prejudice of whose right a forgery is averred to be, is a competent witness to prove the forgery; so also is the person whose receipt is averred to be forged. *United States v. Jackson*, 577.
59. Conversations of the defendant may be given in evidence against him, although not amounting to a confession of guilt, and not corroborated by other testimony; but the Court will not say whether the evidence is sufficient to convict the prisoner. *United States v. Larkin*, 617.
60. Copies of plaintiff's account-books are not evidence. *Lombard v. McLean*, 623.
61. Parol evidence may be given that there was, in fact, no judgment rendered by a justice of the peace as stated in the execution. *Devlin v. Gibbs and Coyle*, 626.
62. Upon an indictment for stealing bank-notes, it is not necessary to produce them on the trial; and if they have been recovered by the owner and passed away, their contents and purport may be proved by parol. *United States v. Lodge*, 673.
63. Upon trial of an indictment for a riot, if there be no evidence against one of the defendants, he may be examined as a witness for the other defendants. *United States v. Fenwick et al.* 675.
64. The Maryland Act of 1715, c. 26, § 2, which excludes the owner of stolen goods from being a witness for the prosecution in the county courts, is not applicable to prosecutions for larceny in the Circuit Court of the District of Columbia. This Court does not derive any part of its jurisdiction from the laws of Maryland, which give jurisdiction to their courts. The jurisdiction of this Court is given by Act of Congress. *United States v. Tarlton*, 682.
65. See CONFESSION. *United States v. Kurtz et al.* 682.
66. Upon an indictment for a seditious libel, it is not competent for the United States, for the purpose of proving the intent of the defendant in publishing the libel charged in the indictment, to give in evidence any papers subsequently published by the defendant, or found in his possession, unpublished by him, which would be libels, and might be substantive subjects of public prosecution, if published. *United States v. Crandell*, 683.
67. After having given evidence tending to prove the publication of the libel here, evidence may be given that other copies of the same libel were found in the possession of the defendant, with certain other papers and pamphlets; but not of the contents of such other papers or pamphlets, unless they have relation to

EVIDENCE, (*Continued.*)

the libels charged in the indictment, and would not, in themselves, be substantive ground of prosecution. *Ibid.*

68. Publications of pamphlets in New York, is not evidence of their publication here, so as to fix upon the defendant here such a knowledge of their publication, as to make his possession, alone, of other copies of the same, even with the words "read and circulate," written upon them, evidence of the publication of them, by him, here. *Ibid.*
69. The United States cannot, in order to show the evil intent with which the defendant published the paper, give, in evidence other unpublished papers or pamphlets found in the defendant's possession, unless accompanied by evidence of some acknowledgment or admission by the defendant, that he knew and approved their contents. *Ibid.*
70. Upon the trial, on the plea of not guilty, the Court will not prevent the United States, from giving evidence in support of a count which might be deemed insufficient upon a motion in arrest of judgment. *Ibid.*
71. The fact that certain papers were found in the possession of the defendant, may be given in evidence, although the papers may have been seized under an illegal warrant. *Ibid.*
72. In a prosecution for a libel, the United States may give evidence to the jury that the defendant was found in the possession of printed copies of the libel charged in the indictment if some evidence has been given of the publication of the same libel in this district. *Ibid.*
73. Upon a count for publishing certain libellous pictures, the Court will not suffer the pamphlets to which they were attached, to be read in evidence to the jury, to show the evil intent with which the defendant published the pictures; nothing but the pictures being charged as a libel in that count. *Ibid.*
74. The counsel for the prosecution, in opening the argument, may read to the jury any part of the pamphlet given in evidence by the United States, which is pertinent to the issue, although not read in the opening of the evidence. *Ibid.*
75. A mulatto born of a white woman is a competent witness against a Christian white person. *Ibid.*
76. To prove that the bill of sale of a slave by a mother to her son, was fraudulent as to her creditors, her declarations prior to the date of the deed were permitted to be given in evidence. *Bowie v. Hunter*, 699.
77. If there is any evidence in support of a credit claimed by the defendant, the Court will not instruct the jury that the defendant is not entitled to such credit. *United States v. Laub*, 703.
78. A transcript from the books of the Treasury of the United States charging the balance of a former settlement, is not, *per se*, evidence upon which the jury can find a verdict for the United States for such balance. *Ibid.*
79. If a public disbursing officer has lost his vouchers without fault on his part, and has produced the best secondary and presumptive evidence in his power, it is for the jury to find whether he has faithfully disbursed the public money which came to his hands. *Ibid.*
80. If a document be read to the jury, by the defendant, by consent, containing a statement of the defendant's conversations, the Court will not instruct the jury that such conversations are not evidence of the facts therein stated. *Ibid.*
81. On a petition for freedom under a will, the burden of proof is on the respondent to show that the petitioner was more than forty-five years old, and that the manumission was in prejudice of creditors. *Gilbert v. Ward*, 171.
82. See COMMITMENT, 1. *United States v. Addison Brown*, 333.

EXECUTION.

1. Replevin will lie for the goods of a stranger taken in execution as the goods of the debtor if taken out of the actual or constructive possession of the plaintiff. *Williamson v. Ringgold*, 39.
2. A purchaser at a sale under judgment and execution takes only the right of the debtor at the time of the judgment.
A judgment at law does not overreach a prior equity of a third person, *bonâ fide* acquired for valuable consideration. *Corporation of Georgetown v. Smith*, 91.
3. See EVIDENCE, 13. *Hilton v. Beck*, 107.
4. See BAIL, 2. *Bernard v. McKenna*, 130.
5. See BANK OF COLUMBIA, 1, 2, 3, 4. *Smith v. Bank of Columbia*, 143.
6. A man cannot be twice taken in execution for the same cause. *United States v. Watkins*, 271.

EXECUTION, (Continued.)

7. An execution against two only, upon a judgment against three, without the suggestion of the death of one, is void on its face. *Ex parte Kennedy et al.* 462.
8. An execution cannot now at this term be quashed which is not returnable until the next term. *Linthecum v. Jones*, 572.
9. An execution against two only, upon a judgment against three, is erroneous, not irregular; voidable, not void.
An action for false imprisonment will not lie for an arrest upon an execution which is only voidable, and not void. *Devlin v. Gibbs and Coyle*, 626.
10. An execution upon a supersedeas judgment confessed more than two months after the date of the original judgment will be quashed. *Chesapeake and Ohio Canal Company v. Barcroft et al.* 659.

FALSE IMPRISONMENT.

1. See **EXECUTION**, 9. *Devlin v. Gibbs & Coyle*, 626.
2. In an action of false imprisonment against the superintendent of the Washington Asylum, he may plead the general issue and give in evidence his justification under a warrant from a justice of the peace. *Ingram v. Butt*, 701.

FALSE PRETENCES.

1. An indictment at common law for obtaining goods by false pretences is not sufficient unless it set forth such false tokens as the common law recognizes. *United States v. Hale*, 83.
2. An indictment cannot be sustained in Washington county, D. C., for obtaining money by false pretences made in Maryland. *United States v. Plympton*, 309.

FEES.

1. The harbor-master in Alexandria, D. C., has no right to charge fees upon vessels which come from Philadelphia through the Delaware Canal, from the Delaware Bay to the Chesapeake Bay, and thence to Alexandria. They are to be considered as bay craft. *Shinn v. McKnight*, 134.
2. See **CLERK**. *Ex parte E. J. Lee*, 197.
3. See **COSTS**, 2. *Ringgold v. Hoffman*, 201.
4. *Id.* 3. *Ward v. Corporation of Washington*, 232.
5. The marshal of the District of Columbia is not entitled to poundage upon the arrest of a debtor upon a *ca. sa.* in Alexandria county, who has been discharged from such arrest by order of the plaintiff without payment. *Swann v. Ringgold*, 238.
6. See **COSTS**, 4. *Howe v. McDermott*, 711.

FELONY.

1. In cases of felony the prisoner is to be arraigned in the criminal bar, or dock. *United States v. Pettis*, 186.
2. Although certain kinds of forgery are made felony by particular statutes, they are punishable under the Penitentiary Act of 1831. *United States v. McCarthy*, 304.
3. See **COMMITMENT**, 1. *United States v. Addison Brown*, 333.
4. *Quære*, whether upon an indictment for a felony, judgment may be rendered as for a misdemeanor? And whether if the facts stated in the indictment do not amount to felony, the word "feloniously" may not be rejected as a surplusage, and judgment rendered as for a misdemeanor. *United States v. Larned*, 335.

FINE AND COSTS.

Security, by recognizance, may be taken for fine and costs in Washington county, D. C. *United States v. Hiliard*, 644.

FISHING GROUND.

If a master of a vessel navigating the Potomac, in the usual course of navigation anchors in the plaintiff's fishing ground, without malice, for the purpose of taking in the residue of the cargo; and when required to depart, his not doing so immediately be not attributable to malice, but to a reasonable cause, and he remove his vessel as soon as the circumstances of wind, weather, and tide will permit, he is not liable for damages. But if the defendant knowingly and without necessity or reasonable commercial purpose, anchor his vessel within the limits of the plaintiff's fishery so as to interrupt the same; or if the defendant having so anchored his vessel within the said limits, knowingly and without

FISHING GROUND, (Continued.)

necessity, or any reasonable commercial purpose, remain within the same so as to interrupt the plaintiff's fishery, the plaintiff is entitled to recover. *Mason v. Mansfield*, 580.

FOREIGN LAW.

Where civil rights are acquired under a foreign law, this Court will enforce them. *Negro Delliah v. Jacobs*, 238.

FOREIGN MINISTER.

1. The domestic servants of a foreign minister are not liable to the ordinary tribunals of the country for misdemeanors. *United States v. Lafontaine*, 173.
2. It is a breach of diplomatic privilege by an officer of justice, to enter the dwelling-house of a secretary of legation, and seize there a runaway slave; for which the officer will be removed from office. *United States v. Madison Jeffers*, 704.

FORGERY.

1. See EVIDENCE, 19. *United States v. Hall*, 229.
2. *Id.* 25. *United States v. Prout*, 301.
3. In an indictment upon the eleventh section of the Penitentiary Act of 1831, for uttering a forged check, it is not necessary to aver that the uttering was "to the prejudice of the right of any other person;" nor that the check was "a paper writing or printed paper." That act was not intended to alter the description of the offence of forgery as defined by the common law, or statute law of Maryland, but to designate the punishment, however the offence may be described in those laws. And although certain kinds of forgery may by those laws be made felony they are punishable under the Penitentiary Act of 1831. *United States v. McCarthy*, 304.
4. A forged paper, inclosed at Baltimore in a letter directed to a person in Washington, D. C., and put into the post-office at Baltimore, is not an uttering of the note in Washington. *United States v. Plympton*, 309.
5. See FELONY, 4. *United States v. Larned*, 335.
6. *Quære*, whether in an indictment under the Penitentiary Act for forging a "paper writing," it must not be averred to be done "to the prejudice of the right" of some person. *Ibid.*
7. See EVIDENCE, 41. *United States v. Anderson*, 476.
8. *Id.* 58. *United States v. Jackson*, 577.
9. *Id.* 26. *United States v. Larned*, 312.

FRAUD.

1. In an action by the vendor, for the price of a blind horse, sold by the plaintiff to the defendant, if the defendant prove fraud in the sale, he need not show that he offered to return the horse; for fraud vacates the contract, and the plaintiff cannot recover upon it; *aliter* where the action is brought by the vendee to recover back the purchase-money paid for the horse. *Cushwa v. Forrest*, 37.
2. An absolute bill of sale, is fraudulent as to creditors, unless accompanied and followed by possession. *Williamson v. Ringgold*, 39.
3. A parol agreement among the purchasers at a public sale, is void under the statute of frauds. *Arden v. Brown*, 121.
4. See EVIDENCE, 76. *Bowie v. Hunter*, 699.
5. An absolute deed of personal property, where possession does not accompany and follow the deed, is void, at common law, as to subsequent purchasers without notice, although acknowledged and recorded agreeably to the Maryland Act of 1729, c. 8, § 5 and 6. *Hamilton v. Franklin et al.* 729.
6. See DEED, 7. *Smith v. Ringgold*, 124.

FREEDOM.

1. The right of a citizen of the United States to import a slave into the county of Washington, D. C., under the second section of the Maryland Act of 1796, c. 67, is forfeited by the sale of the slave within three years after the importation. *Negro Christopher Harris v. Nelly Alexander*, 1.
2. Constructive emancipation of slaves by will. *Negro Harry Quando v. Clagett*, 17.
3. Slaves escaping from Maryland, and suing here for their freedom, will not be delivered up to the person claiming to be their owner, upon security to return

FREEDOM, (*Continued.*)

- them to Maryland; their claim for freedom having arisen here, and their witnesses residing here. *Negroes Simon and Lewis v. Paine's Administrator*, 99.
4. Slaves, removed by their owner from Maryland, or from Georgetown, D. C., to Virginia, and kept therein one whole year, are entitled to freedom under the law of Virginia, unless the owner took the oath prescribed by that law, within the time thereby limited; but after the lapse of twenty-five or thirty years, the jury may presume that such oath was taken as prescribed, and within the time limited. *Negro Thomas Butler et al. v. Gabriel Duvall*, 167.
 5. Slaves carried from Virginia to Maryland, with intent to reside therein, are entitled to freedom.
If slaves be removed by their owner from Virginia to the county of Washington, D. C., and there sold within three years after such removal, the jury may infer that they were imported for sale, and if so, they are entitled to freedom. *Ibid.*
 6. On a petition for freedom under a will, the burden of proof is on the respondent to show that the petitioner was more than forty-five years of age, or that the manumission was in prejudice of creditors. *Negro Emanuel Gilbert v. Ward*, 171.
 7. A slave manumitted by will, after a term of service, is not free until the term of service has expired, but the Court will continue the injunction originally granted, to prevent the removal of the petitioner from the jurisdiction of the Court, unless the defendant will give bond to the United States, with good security, that he will not suffer or permit him to be so removed. *Negro Kitty v. McPherson*, 172.
 8. A slave brought into the county of Washington, D. C., from Virginia, by her owner, afterwards ran away, and her owner sold her "running." *Held*, that she did not thereby lose the benefit of the provision of law in her favor. *Negro Mary and child v. Jane Talburt*, 187.
 9. A person coming to reside here, may, under the Maryland Act of 1796, c. 67, lawfully bring his slaves with him; but if he sells them within three years after his removal, he loses the benefit of the exception in his favor, contained in the second section, and they are entitled to freedom under the first section of the act. *Ibid.*
 10. Two witnesses are necessary to a deed of manumission, under the Maryland Act of 1796, c. 67, § 29. *Negro Samuel v. Childs et al.* 189.
 11. If a female slave, manumitted by the last will of her owner, to be free at the age of twenty-five years, has a child born after the death of the testator, and before she arrives at the age of twenty-five years, such child is a slave. *Ibid.*
 12. A citizen and resident of Virginia, commenced *bonâ fide* removing his furniture and family to Washington, D. C., in November, 1826, and continued such act, *bonâ fide*, at intervals during the month of December, and up to January 7, 1827, and then, within one year thereafter, brought the petitioners into the city of Washington;
The Court held, that the petitioners were not thereby entitled to freedom; but if he did perfectly, entirely, and completely remove to the city of Washington, and had rented a house and put some part of his family and furniture into it, and claimed the privileges of a resident of that city, in or before November, 1826, although he had not removed all his family and property, it was competent for him to bring the rest of his family and furniture to Washington, after his removal, and his so bringing them, after his removal, did not prevent his being a resident in or before November, 1826. *Negro Esther v. B. H. Buckner*, 253.
 13. A negro slave, owned in Alexandria, D. C., was removed, with her owner, to Maryland to reside. She ran away from her owner in Maryland, and came to Alexandria. Her owner in Maryland sold her "running," to a resident of Alexandria. *Held*, that this escape of the slave into Alexandria, was not a voluntary importation into Alexandria, and that the sale was not such a sale as could give her a right to freedom under the Maryland law of 1796, c. 67. *Negro Clara Moore v. Jacobs*, 312.
 14. The sale, in the District of Columbia, of a Maryland slave, brought here by her owner, does not give the slave a title to freedom under the Maryland statute of 1817, c. 112, which prohibits the sale, to a non-resident of the State, of any

FREEDOM, (*Continued.*)

- slave, having a contingent right to freedom. *Negro Rebecca Hobbs v. Magruder*, 429.
15. See EVIDENCE, 36. *Negro Robert Thomas v. Magruder*, 446.
 16. A Virginia slave, of a Virginia owner, was loaned by the widow to her son-in-law in Washington, D. C., until the estate should be settled and distribution made. The slave resided in Washington, under that loan, more than a year, and was then sent back to Virginia, and upon settlement of the estate, was assigned to one of the distributees;
Held, that the slave did not thereby acquire a right to freedom under the Maryland Act of 1796, c. 67, although the administrator, who was neither party nor privy to the lending, afterwards knew it and did not object. *Negro Frederick Bowman v. Henry Barron*, 450.
 17. The list of slaves required by the 11th section of the Maryland Act of 1796, c. 67, must designate the sex. The name, "Jo." does not designate the sex. *Negro Joseph Crawford v. Robert A. Slye*, 457.
 18. A slave imported into the county of Washington, D. C., under the 11th section of the Maryland Act of 1796, c. 67, is entitled to freedom unless recorded within three months thereafter. *Negro Keziah v. T. G. Slye*, 463.
 19. A colored child, born before her mother's title to freedom has accrued and become complete, is a slave of the person entitled to the service of her mother at the time of her birth. *Negro Ann Brooks v. Nutt*, 470.
 20. See ATTACHMENT, 10, 11, 12. *Negro John Thornton v. Irrine Davis*, 500.
 21. A person cannot be a resident of two States at the same time. *Negro Rachel Brent v. Armfield*, 579.
 22. In order to protect the right of a sojourner to his slave, brought in under the 4th section of the Act of 1796, c. 67, it is not necessary that he should bring the slave with him.
 The title of the defendant to the slave, is not protected by the 4th section, if he suffer the slave to remain two years after he himself has returned. *Ibid*.
 23. The right to remove slaves from one county to another in the District of Columbia, under the 9th section of the Act of Congress of the 24th June, 1812, is confined to the inhabitants of the county from which the slaves are to be removed. *Negro William Fenwick v. Tooker*, 641.
 24. A temporary hiring of Virginia slaves in the county of Alexandria, D. C., with intent to evade the law in force in the county of Washington, against the importation of slaves into that county, will not authorize the owner residing in Washington, to bring them into the county of Washington to reside therein. *Negroes Sam and Barbara Lee v. Elizabeth Lee*, 643.
 25. The Act of Congress, June 24, 1812, § 9, does not authorize an inhabitant of Washington, owning slaves in Alexandria, to remove them to Washington. *Ibid*.
 26. The place to which a person has removed, with intent to remain there an indefinite time, and as a place of present domicil, is the place of his domicil, although he may entertain a floating intention to return at some future period. *Negro Herbert Harris v. Firth*, 710.
 27. If a person comes into the county as a sojourner, and brings with him his slave, and dies here, and his executor has been prevented by the institution of this suit, from carrying the slave out of the district, the slave is not, by such importation, entitled to freedom. *Ibid*.
 28. An importation of slaves, by a person who has only a life estate in them, is an importation within the Maryland Act of 1796, c. 67, § 1; and the consent of the reversioner to the importation, is not necessary to give freedom to the slaves thus imported. The question of the intent with which the importation is made, is for the jury. *Negro Charles Taylor v. Artiss Buckner*, 540.
 29. The marshal has not a right to include in his account against the United States, his imprisonment fees for persons committed as runaway servants or slaves, under the adopted laws of Maryland. But the marshal may include in his account, his fees for the maintenance of petitioners for freedom committed by order of the Court for safe keeping, if they obtain their freedom; otherwise the owners must pay the fees. *Runaways and Petitioners for Freedom*, 489.

GAMING.

1. See BY-LAW, 3. *Corporation of Washington v. Cooly*, 103.

GAMING, (*Continued.*)

2. See EVIDENCE, 10, 11. *United States v. Miller*, 104.
3. Upon an indictment for keeping a public gaming-house, the day laid in the indictment is not material, so that it is within the time of limitation, and not within the time of a previous conviction or acquittal. All the acts of keeping such a house, before finding the indictment, constitute but one offence. *United States v. James McCormick*, 104.
4. The penalty for keeping a faro-table in a place occupied as a tavern, contrary to the Maryland Act of 1797, c. 110, may be recovered by indictment. *United States v. Evans*, 105.
5. See DISORDERLY HOUSE, 1. *United States v. Dixon*, 107.
6. See BY-LAW, 4. *Dixon v. Corporation of Washington*, 114.
7. The first and twelfth sections of the Penitentiary Act of the District of Columbia, so far as they relate to the offence of keeping a faro-bank or other common gaming-table, are to be construed together; and when so construed, they contain a complete description of the offence, and its punishment. *United States v. Henry Smith*, 629.
8. Neither a single act of play at a gaming-table called a sweat-cloth, at the races, nor even a single day's use of it, on the race-field is a keeping of a common gaming-table within the Penitentiary Act for the District of Columbia. *Id.* 659.
9. An indictment under the Penitentiary Act for the District of Columbia, for keeping a faro-table, must charge the offence to be either the keeping of a common gaming-table; or must positively charge it to be the keeping of a faro-bank, not "a gaming-table called a faro-bank." *United States v. Cooley*, 707.
10. An indictment charging that the defendant did keep a certain gaming-table called a faro-bank, is not sufficient under the Penitentiary Act for the District of Columbia. *United States v. Milburn*, 719.
11. See DISORDERLY HOUSE, 9. *Ibid.*
12. In a criminal case, it is not necessary, on the part of the prosecution, to summon witnesses to prove the sanity of the accused, as every person is presumed to be of sound mind until the contrary is proved.
The accused has no right to send witnesses to the grand jury, to prove merely exculpatory matter. *United States v. Richard Lawrence*, 514.

GUARDIAN.

1. A guardian appointed by the Orphans' Court of the county of Washington, D. C., is liable upon his bond given here, for money received by him, in Maryland, for the use of his ward. *United States v. Nicholls*, 191.
2. A guardian whose authority is revoked, is bound by his bond, to pay over the money in his hands to the person appointed by the Orphans' Court to receive it, although the person so appointed has not given bond as guardian. *Id.* 290.

GUARANTY.

1. See BILLS AND NOTES, 9. *Dobbins et al. v. Bradley*, 298.
2. When credit is given upon a guaranty, notice thereof should be given to the guarantor in a reasonable time thereafter. Where six months' credit was given upon the guaranty, five days' notice was too short. *Ibid.*
3. See ASSIGNMENT, 4. *Brown v. Decatur*, 477.
4. In an action upon a letter of guaranty, the plaintiff must show that he gave notice in a reasonable time, to the defendant, of his acceptance of the guaranty and of the value of the articles furnished. *Burns v. Semmes*, 702.
5. Although the person in whose favor the letter of guaranty is given has passed to the credit of the defendant in account the value of the goods obtained upon the guaranty, and that account has been settled, yet the plaintiff cannot recover on the count for money had and received. *Ibid.*
6. The Court will not give an instruction not warranted by the evidence. *Ibid.*

HARBOR-MASTER.

- See FEES, 1. *Shinn v. McKnight*, 134.

INDEMNITY.

- See EQUITY, 23. *Stewart v. Callaghan*, 594.

INDICTMENT.

1. See FALSE PRETENCES, 1. *United States v. Hale*, 83.

INDICTMENT, (*Continued.*)

2. See FALSE PRETENCES, 2. *United States v. Plympton*, 309.
3. See GAMING, 3. *United States v. James McCormick*, 104.
4. *Id.* 4. *United States v. Evans*, 105.
5. See FOREIGN MINISTER, 1. *United States v. Lafontaine*, 173.
6. See EVIDENCE, 19. *United States v. Hall*, 229.
7. See CONTEMPT, 1. *United States v. Beale*, 313.
8. *Quære*, whether an indictment will lie for assault and battery upon "a person unknown;" not, unknown to the jurors. *United States v. Davis*, 333.
9. See ASSAULT AND BATTERY, 3. *United States v. Turley*, 334.
10. See FELONY, 4. *United States v. Larned*, 335.
11. See FORGERY, 6. *Ibid.*
12. To charge the prisoner as for a second offence; an averment that "on the 2d of October, 1832, at a circuit court of the District of Columbia for the county of Alexandria, the prisoner was tried and convicted of larceny, as by the record of the said court doth appear;" without averring that the conviction was by judgment and reciting the record of conviction &c., is not a sufficient averment to justify the court in sentencing the prisoner to the penitentiary upon an indictment for stealing fifty-five cents. *United States v. Henry Thompson*, 335.
13. A conviction for stealing a pocket-book is a conviction of stealing all that it contained at the time of the theft, belonging to the same person. *United States v. Negro John*, 336.
14. Nine cows belonging to divers persons were stolen by the defendant from the commons in and about the city of Washington, and the grand jury found nine separate indictments; six of the cows were averred to have been stolen on the 14th of October, 1833, the others on different days. The Court refused to quash any of these indictments. *United States v. Joseph Goddard*, 444.
15. See BILLS AND NOTES, 15. *United States v. John Lee*, 446.
16. *Quære*, whether a promissory note, found in the hands of the maker, with two blank indorsements, can be considered as the property of the maker; and whether it be of any value to him?
If the note was in the pocket-book of the maker of the note at the time the pocket-book was stolen by the defendant; a conviction of stealing the pocket-book is a bar to a subsequent indictment for stealing the note. *Ibid.*
17. The want of a prosecutor's name upon the indictment is no ground for arresting the judgment. *United States v. Henry Lloyd*, 464.
18. A *nolle prosequi*, without the consent of the defendant, after the jury is sworn, is equivalent to an acquittal, and may be so pleaded. *United States v. Farring*, 465.
19. A motion to quash an indictment for want of the name of a prosecutor, is too late after verdict.
The Court will not quash the indictment for want of the name of a prosecutor if the witnesses were called for by the grand jury; but will quash an indictment where the name of a prosecutor was not written upon it, and no order of the court to send the witnesses to the grand jury, and it does not appear that the witnesses were called for by the grand jury. *United States v. Henry Lloyd*, 467.
20. See CRUELTY, 1. *United States v. R. B. Lloyd*, 472.
21. *Id.* 2. *United States v. Daniel Jackson*, 483.
22. *Id.* 3. *United States v. George Cross*, 603.
23. In a case of murder, the Court, at the request of the prisoner's counsel, will ask each juror, as he comes to be sworn, "whether he has formed and delivered any opinion as to the guilt of the prisoner, upon the indictment." *United States v. Joseph Woods*, 484.
24. Upon a trial for murder, the declarations of the deceased, not made *in extremis*, or with a settled conviction that he is about to die, cannot be given in evidence. *Ibid.*
25. See EVIDENCE, 45, 46, 47, 48. *Ibid.*
26. See BAIL, 10. *United States v. Robert Clark*, 506.
27. *Id.* 11. *United States v. Richard Lawrence*, 518.
28. *Id.* 14. *United States v. Fleet Smith*, 727.
29. An indictment for manslaughter need not contain the words, "in the fury of his mind." *United States v. Henry Frye, a Slave*, 539.
30. The jumping on board of a boat then in custody of the prisoner, after being

INDICTMENT, (*Continued.*)

- warned not to do so, and with intent to do him some great bodily harm, and actually assaulting him with that intent, and putting the prisoner in fear of such great bodily harm, will excuse the homicide; but the jumping on board the boat, under the circumstances stated was not an actual assault upon the prisoner who was fifteen feet from the deceased at the time of the shooting. *Ibid.*
31. A slave, convicted of manslaughter, is, by the law of Virginia in force in the county of Alexandria, D. C., to be burnt in the hand and publicly whipped. *Ibid.*
 32. See EVIDENCE, 57. *United States v. Davidson et al.* 576.
 33. A slave convicted of larceny in Alexandria, is to be punished by whipping, although not charged as a slave in the indictment. *United States v. Negro Nelson*, 579.
 34. An indictment must conclude, "against the government of the United States." *United States v. Boling*, 579.
 35. An indictment under the Penitentiary Act for the District of Columbia, for stealing a bank-note, must state the amount as well as the value of the note. *United States v. Richard Barry*, 606.
 36. "One hundred silver coins of the value of seventy-five dollars," is a sufficient description of the money stolen. *Ibid.*
 37. *Quere*, whether it is an indictable misdemeanor to attempt to commit an offence which, if carried into execution would not go to corrupt the fountain of justice, of legislation, or the executive administration of the law, or involve actual violence or breach of the peace. It makes no difference whether the attempted offence be at common law or created by statute. *United States v. Henning*, 608.
 38. To attempt to sell a free mulatto as a slave for life, is not an indictable offence in the District of Columbia. *Ibid.*
 39. In an indictment for perjury, the materiality of the facts sworn to must appear in the indictment, either by averment, or by a statement of facts which show their materiality. *United States v. Cowing*, 613.
 40. The Court refused to quash an indictment for a conspiracy to cheat by selling a free negro as a slave. *United States v. Spalding et al.* 616.
 41. See EVIDENCE, 59. *United States v. Larkin*, 617.
 42. Unnecessary words, not altering the nature of the charge, inserted in the indictment by the grand jury, may be rejected as surplusage, after verdict. *Ibid.*
 43. The time and place of conspiracy must be stated in the indictment. *United States v. Soper et al.* 623.
 44. See BARON AND FEME, 3. *United States v. Murphy*, 681.
 45. See GAMING, 9. *United States v. Cooly*, 707.
 46. *Id.* 10. *United States v. Milburn*, 719.
 47. See DISORDERLY HOUSE, 9. *Ibid.*
 48. In an indictment under the penitentiary act, for stealing a bank-note, it is not necessary to state that it is a bank-note "for the payment" of money or other valuable thing. *United States v. McDaniel*, 721.
 49. See BARON AND FEME, 5. *United States v. Parsons et al.* 726.
 50. An indictment for stealing "sundry pieces of silver coin of the value of twenty-dollars," is too vague. *United States v. Kurtz*, 674.

INFANCY.

1. See EQUITY, 11. *Nicholson v. McGuire*, 194.
2. An infant after the death of his father, cannot recover his wages for services performed in the lifetime of his father, under a contract made with the father, who has a right to dispose of his earnings or any part thereof. *Roby v. Lyndall*, 351.
3. The father had assigned to the defendant a right to receive, to his own use, one half of the boy's wages, in consideration of the defendant's engaging to teach him the use of carpenter's tools; and the defendant had received the same; held, that the boy could not recover it in an action for money had and received. It makes no difference that the services were performed for the United States, and in their navy-yard. *Ibid.*

INFORMATION.

1. See AMENDMENT, 4. *Gunton et al v. Ingle et al.* 438.
2. An information, in the nature of a writ of *quo warranto*, may be sustained against

INFORMATION, (*Continued.*)

a person usurping an office under a private corporation ; but it is in the discretion of the Court to grant it or not. *Ibid.*

3. The information must show that the office usurped is a corporate office ; and it must be a case in which the court would have power to impose a fine ; a case in which the public is concerned, or in which the authority of the United States is contemned or abused.

Although an information has, in effect, become a civil proceeding, yet its form is criminal. *Ibid.*

INJUNCTION.

1. See EQUITY, 17. *Oliver v. Decatur*, 458.
2. See EMBEZZLEMENT. *McKenzie & Co. v. Cowing*, 479.
3. See ATTACHMENT, 10. *Negro John Thornton v. Davis*, 500.
4. See EQUITY, 21. *Caldwell v. Walters*, 577.

INQUISITION.

1. See CHESAPEAKE AND OHIO CANAL CO., 2, 3, 4, 5, 6, 7, 8. *Chesapeake and Ohio Canal Co. v. Union Bank*, 75.
2. *Id.* 1. *Chesapeake and Ohio Canal Co. v. Binney*, 68.
3. *Id.* 9. *Chesapeake and Ohio Canal Co. v. Mason*, 123.
4. See CORPORATION OF GEORGETOWN, 2. *Wright v. Corporation of Georgetown*, 534.

INSANITY.

1. See BAIL, 11, 12, 13. *United States v. Richard Lawrence*, 518.
 2. In a criminal case, it is not necessary, on the part of the prosecution, to summon witnesses to the grand jury to prove the sanity of the accused, as every person is presumed to be of sound mind until the contrary is proved.
- The accused has no right to send witnesses to the grand jury to prove merely exculpatory matter. *Id.* 514.

INSOLVENT.

1. An insolvent debtor found guilty upon allegations filed under the 7th section of the insolvent act of the District of Columbia, will not be ordered into close custody if he is out upon a prison-bonds bond. *McClean v. Plumsell*, 86.
2. What allegations are sufficient to prevent a discharge under the insolvent act of the District of Columbia. *Eckle v. Fitzgerald*, 90.
3. An insolvent debtor, discharged under the insolvent act of the District of Columbia, cannot maintain a suit in his own name, for a cause of action which accrued before his discharge ; nor can his administrator. *Nevitt v. Maddox*, 107.
4. The conviction of an insolvent debtor, upon allegations filed upon a former petition, when he was committed in execution in favor of another creditor who has since been paid, is not a bar to his subsequent application for the benefit of the insolvent act, when committed under a subsequent execution. *Holtzman v. Plumsell*, 184.
5. *Quere*, whether a non-resident creditor is bound by the discharge of his debtor, under the insolvent law of the District of Columbia, who had been arrested at his suit, but who, at the time of the discharge, was out upon a bail-bond to the marshal ? *Harrison & Sterrett v. Boyd*, 199.
6. The Act of Congress of May 6, 1822, for the relief of certain insolvent debtors, is not confined to non-resident debtors. *Cook v. Fenton*, 200.
7. A discharge, under the insolvent act of the District of Columbia, does not affect the rights of a non-resident creditor, unless the debtor be confined at his suit at the time of the discharge ; and special bail will be required notwithstanding such discharge. *Hauptman v. Nelson*, 341.
8. This Court will give, to a discharge under the insolvent law of a State, the same effect here as it would have in the State in which it was granted. *Channing v. Reiley*, 528.
9. Debtors of the United States, are not entitled to the benefit of the prison-bonds, in the District of Columbia. *United States v. Gorman*, 550.

INTEREST.

1. See EQUITY, 10, 11. *Nicholson v. McGuire*, 194.

INTEREST, (*Continued.*)

2. If the interest is, by the agreement, payable annually, it is not usury to add it to the principal at the end of the year, and take a new note for the whole bearing interest. *Oliver v. Decatur*, 461.
3. See ADMINISTRATION, 6, 7. *Union Bank v. Smith*, 509.

JOINT DEFENDANTS.

1. If one only, of two joint defendants, be taken, who pleads non assumpsit, and issue be joined thereon, and the defendant taken offers ready for trial, at the trial-term, the plaintiff has not a right to continue the cause until the other defendant be taken; but must amend his declaration by suggesting or averring that the other defendant is not yet taken, and upon such amendment, the defendant may have leave to plead *de novo*. *Bank of Columbia v. Hyatt et al.* 38.
2. See EXECUTION, 7. *Ex parte Kennedy et al.* 462.
3. The plaintiff, in a joint action against two defendants, may, of right, at the trial-term, amend his declaration by suggesting the proceeding by two *non ests* against the defendant who has not been taken. *Brooklyn White Lead Company v. Pierce*, 531.
4. In a joint action against two defendants, after judgment confessed by one of the defendants, it is too late for him to move to set aside the judgment because the *capias* was not renewed and regularly returned *non est* at every term until the trial-term. The practice in such cases is unsettled. *McCandless v. McCord*, 533.
5. See EVIDENCE, 57. *United States v. Davidson*, 576.
6. EXECUTION, 9. *Devlin v. Gibbs & Coyle*, 626.
7. If two be jointly indicted for robbery, and if one be acquitted and one convicted, the latter may have a new trial without the other, who may be examined as a witness upon the new trial. *United States v. Campbell & Turner*, 658.

JUDGMENT.

1. See AGENT, 2. *Bank of Washington v. Bank of the United States*, 86.
2. In a criminal case, if the defendant has forfeited his recognizance, the Court will not hear a motion in arrest of judgment, until the defendant appear in proper person. *United States v. Askins*, 98.
3. A transcript of a judgment, and proceedings of a justice of the peace in Pennsylvania, entered of record in a county court, is not a judgment of that court. *Allen v. Arguelles*, 170.
4. The want of the name of a prosecutor written on the indictment, is not a good ground for arresting the judgment. *United States v. Turley*, 334.
5. See ADMINISTRATION, 3. *Bettinger v. Ridgway*, 340.
6. The confession of judgment, in order to operate as a *supersedeas*, must be made in the very words of the statute of Maryland, 1791, c. 67; and an execution issued upon a judgment confessed in another form, by way of *supersedeas*, is null and void, and the justice who issued the execution, the constable who served it, and the party who ordered it, were trespassers, and liable to the party injured thereby for his damages. *Plant v. Holtzman*, 441.
7. See EXECUTION, 7. *Ex parte Kennedy and Devlin*, 462.
8. It is no good ground of arrest of judgment in a criminal case, that the marshal did not summon forty-eight jurors, and that the clerk did not draw twenty-three grand jurors by ballot, according to the Maryland Act of 1797, c. 87, which was only applicable to the county courts; nor that one of the petit jurors had been summoned and served on the jury of the preceding term. *United States v. Peaco et al.* 601.
9. See EXECUTION, 9. *Devlin v. Gibbs & Coyle*, 626.
10. The cause of action, to recover back money paid upon a judgment reversed for error, arises upon the reversal, although the appellate court at the time of reversal, order a *venire de novo* to be issued by the inferior court, and the cause is still there pending; and the limitation of the statute begins to run from the time of such reversal. *Bank of Washington v. Neale*, 627.
11. See EXECUTION, 10. *Chesapeake and Ohio Canal Co. v. Barcroft*, 659.

JURISDICTION.

1. An indictment for bigamy must be tried in the county in which the second marriage was celebrated. *United States v. Jernegan*, 1.

JURISDICTION, (*Continued.*)

2. See DETINUE, 1, 2. *Maynadier v. Duff*, 4.
3. See CERTIORARI, 1. *Kennedy v. Gorman*, 347.
4. See APPEAL, 6, 7. *Corporation of Washington v. Eaton*, 352.
5. The Circuit Court of the District of Columbia has power to hold special sessions for the trial of criminal causes; and has jurisdiction, at a special session, to try offences committed between the time of ordering, and the time of holding such session; and its jurisdiction is not limited to such causes of federal jurisdiction as may be tried in a Circuit Court of the United States sitting in a State. *United States v. Christiana Williams*, 372.
6. See BY-LAW, 9, 10, 11, 12, 13. *Ex parte Julia Reed*, 582.
7. This Court does not derive any part of its jurisdiction from the laws of Maryland, which give jurisdiction to their courts. The jurisdiction is given by Act of Congress. *United States v. Tarlton*, 682.
8. See BY-LAW, 16. *Hall v. Corporation of Washington*, 722.

JURORS.

1. CHESAPEAKE AND OHIO CANAL Co. 1. *Chesapeake and Ohio Canal Co. v. Binney*, 68.
2. The Court refused to grant a new trial, moved for on the ground that one of the jurors was brother-in-law of the plaintiff. *Orme v. Pratt*, 124.
3. See CHALLENGE. *United States v. Summers*, 334.
4. See EVIDENCE, 43. *United States v. Woods*, 484.
5. See CORPORATION OF GEORGETOWN, 2. *Wright v. Corporation of Georgetown*, 534.
6. See JUDGMENT, 8. *United States v. Peaco*, 601.

JURY.

1. See CHESAPEAKE AND OHIO CANAL Co. 2. *Chesapeake and Ohio Canal Co. v. Union Bank*, 75.
2. See EVIDENCE, 43. *United States v. Woods*, 484.
3. A foreigner is not entitled to a jury *de medietate* in Washington county, District of Columbia. *United States v. McMahon*, 573.
4. See BALTIMORE AND OHIO RAILROAD Co. 3. *Baltimore and Ohio Railroad Co. v. Van Ness*, 595.
5. Upon an indictment for a riot, it is necessary to prove an agreement or proposal to do the unlawful act before it was done, or at the time of doing it; but from the doing of the act, accompanied by declarations of an intent to do it, the jury may infer a previous intent and agreement to do it, and mutually to assist each other in doing it; and in the absence of all contradictory evidence, they ought so to infer. *United States v. Stockwell et al.* 671.
6. After an instruction has been given by the Court to the jury, at the request of either party, and argued by counsel on both sides, the Court will not permit the counsel to argue the same question of law to the jury, in contradiction to the opinion of the Court. *Ibid.*
7. The right of the jury, in a criminal case, to decide the law as well as the fact, results only from their power to find a general verdict. *Ibid.*
8. The question whether one fact may be inferred from another, is a question of law, and to be decided by the Court; and if, in law, the inference can be drawn, it ought to be drawn, if there be no contradictory evidence. *Ibid.*
9. Upon an indictment for a riot, the jury may infer the intent from the acts done, and ought so to infer, in the absence of all contradictory evidence. *United States v. Fenwick et al.* 675.
10. When either party, in a criminal prosecution, has asked an instruction to the jury upon a question of law, and the other party has proceeded to argue the point before the Court, and the Court has given an instruction upon that question, the counsel has no right to argue the same question of law before the jury; but if either party does not join in the argument to the Court, but insists upon arguing it to the jury, the Court will order him to proceed with his argument; and will, after the argument is closed, give or refuse the instruction prayed, or give such other instruction as the Court shall think proper. *Ibid.*

JUSTICES OF THE PEACE.

1. See DETINUE, 1, 2. *Maynadier v. Duff*, 4.
2. See APPEAL, 5. *Chase v. Smith*, 90.

JUSTICE OF THE PEACE, (Continued.)

3. See JUDGMENT, 3. *Allen v. Arguelles*, 170.
4. See CONTEMPT, 1. *United States v. Beale*, 313.
5. See BY-LAW, 6, 7, 8. *Ex parte Thomas Williams*, 343.
6. See CERTIORARI, 1. *Kennedy v. Gorman*, 347.
7. See APPEAL, 6, 7. *Corporation of Washington v. Eaton*, 352.
8. See CERTIORARI, 2. *Lenox v. Arguelles*, 477.
9. See ATTACHMENT, 7. *Doyle v. Richards*, 527.
10. See CORPORATION OF GEORGETOWN, 2. *Wright v. Corporation of Georgetown*, 534.
11. See ATTACHMENT, 13. *Ex parte J. B. Gorman*, 572.
12. See BY-LAW, 9, 10, 11, 12, 13. *Ex parte Julia Reed*, 582.
13. See EQUITY, 34. *United States v. Cowing*, 613.
14. A slave charged with larceny is to be tried and punished by a justice of the peace. *United States v. Simms*, 618.
15. See APPRENTICE, 4. *Gody v. Plant*, 970.
16. *Id.* 3. *Barrett v. McPherson*, 475.
17. See FALSE IMPRISONMENT. *Ingram v. Butt*, 701.
18. See BY-LAW, 14, 15, 16. *Hall v. Corporation of Washington*, 722.

KIDNAPPING.

1. In an indictment under the 17th section of the Penitentiary Act, District of Columbia, it is not necessary to aver that the defendant was a free man. *United States v. Henning*, 645.
2. That section does not apply to negroes kidnapped out of the district, and brought within it. *Ibid.*
3. *Quere*, whether it applies to the seizure or seduction of any free negro or mulatto not a resident of the District of Columbia. *Ibid.*

LARCENY.

1. See INDICTMENT, 12. *United States v. Henry Thompson*, 335.
2. *Id.* 13. *United States v. Negro John*, 336.
3. *Id.* 14. *United States v. Goddard*, 444.
4. See BILLS AND NOTES, 15, 16. *United States v. John Lee*, 446.
5. A slave, convicted of larceny in Alexandria county, is to be sentenced to be burnt in the hand and whipped. *United States v. Negro Nathan, a slave*, 470.
6. See INDICTMENT, 33. *United States v. Negro Nelson*, 579.
7. *Id.* 35, 36. *United States v. Richard Barry*, 606.
8. See JUSTICE OF THE PEACE, 14. *United States v. Simms*, 618.
9. See EVIDENCE, 62. *United States v. Lodge*, 673.
10. See BARON AND FEME, 3. *United States v. Murphy*, 681.
11. See EVIDENCE, 64. *United States v. Tarlton*, 682.
12. See CONFESSION. *United States v. Kurtz et al.* 682.
13. See INDICTMENT, 48. *United States v. McDaniel*, 721.
14. See BARON AND FEME, 5. *United States v. Parsons et al.* 726.

LIBEL.

See EVIDENCE, 66 to 75 inclusive. *United States v. Crandell*, 683.

LIEN.

1. See EQUITY, 5, 6. *Corporation of Georgetown v. Smith*, 91.
2. A master of a vessel, has no lien, for his wages, upon goods consigned to and owned by his owners. *Vowell v. Bacon*, 97.
3. See BANK OF COLUMBIA, 1. *Smith v. Bank of Columbia*, 143.
4. In cases under the lien law, the Court will not oblige the defendant to plead at the return term. *King et al. v. Shaw*, 457.
5. A person furnishing materials and labor in the erection of a building in the city of Washington, cannot claim the benefit of the lien given by the Act of Congress of the 2d of March, 1833, c. 79, after the expiration of two years from the commencement of the building, unless an action shall have been instituted or the claim filed in the clerk's office, within three months after performing the work and furnishing the materials. *McClelland v. Withers*, 668.

LIMITATION.

1. See JOINT DEFENDANTS, 1. *Bank of Columbia v. Hyatt et al.* 38.
2. See AGENT, 1. *United States v. Nourse*, 151.

LIMITATION, (Continued.)

3. An offer by the defendant to the plaintiff's agent, after the commencement of the suit, to pay the debt in a manner and upon terms which he was not authorized to accept, is not a sufficient promise to take the case out of the statute of limitations. *Hamilton v. Carnes*, 531.
4. The limitation of twelve years in the Maryland statute of limitations of 1715, c. 23, § 6, does not continue to run from the date of the original judgment, if it has been revived by *scire facias* within the twelve years. The expression, "Twelve years' standing," means twelve years' standing without any proceeding towards enforcing payment.
The plea is not supported unless twelve years have elapsed since the revival of the judgment by *scire facias*. *Digges v. Eliason*, 619.
5. See JUDGMENT, 10. *Bank of Washington v. Neale*, 627.
6. If there be two counts in the declaration, and the statute of limitations be pleaded to both, it is not necessary that it should be supported as to both; but it may be supported as to both or either. *Chew v. Baker*, 696.
7. An account in bar which consists of debits only against the plaintiff, does not take the plaintiff's cause of action out of the statute of limitations, although the last item of debit be within the three years. *Ibid*.
8. See CORPORATION OF WASHINGTON, 5. *United States v. Gorman*, 574.
9. See CERTIORARI, 3. *Nicholls v. Corporation of Georgetown*, 576.

MANSLAUGHTER.

See INDICTMENT, 29, 30, 31. *United States v. Henry Frye, a slave*, 539.

MANUMISSION.

1. Constructive emancipation of slaves by will. *Quando v. Clagett*, 17.
2. See EVIDENCE, 81. *Negro Emanuel v. Ward*, 171.
3. See FREEDOM, 7. *Negro Kittq v. McPherson*, 172.
4. *Id.* 10, 11. *Negro Samuel v. Childs et al.* 189.
5. A testatrix charged her lands as well as her personal estate with the payment of her debts and legacies, and, by her will, manumitted certain of her slaves, to take effect at her death.
The personal assets were not sufficient, without the slaves, but, with the real estate, were more than sufficient to pay the debts; held, that such manumission was not "in prejudice of creditors," and that the slaves were entitled to their freedom. *Negro Eliza and Kitty Chapman v. Fenwick*, 431.
6. If the manumission is to be considered as a specific legacy, the assent of the executor was given by suffering the negroes to go at large as free, for a period of eight years after the death of the testatrix. *Ibid*.
7. If there be a fund for the payment of debts and pecuniary legacies, the executor may be compelled to assent to a specific legacy. *Ibid*.
8. A specific legacy shall not abate, or contribute, if there be enough without it. *Ibid*.
9. A devise of real estate, "after payment of debts," is a charge of the debts upon the real estate. *Ibid*.
10. An assent to a legacy cannot be revoked. *Ibid*.
11. Emancipation, by will stands on stronger ground than a specific legacy, and does not need the assent of the executor.
12. The burden of proof lies on the creditors to show that an emancipation by will is in their "prejudice." *Ibid*.

MARRIAGE.

1. See BIGAMY, 1. *United States v. Jernegan*, 1.
2. *Id.* 2, 3, 4. *United States v. Jennegan*, 118.

MARSHAL.

1. See BAIL, 1. *Jackson v. Simonton*, 12.
2. See COSTS, 2. *Ringgold v. Hoffman*, 201.
3. See FEES, 5. *Swann v. Ringgold*, 238.
4. See BOND, 3, 4, 5, 6, 7. *Jackson v. Simonton*, 255.
5. See FREEDOM, 29. *Runaways and Petitioners for Freedom*, 489.
6. In case of riot, the marshal has a right to take the posse, and to call on all citizens to aid him in arresting the rioters; and the citizens have a right to arm themselves. *United States v. Fenwick et al.* 675.

MASTER OF VESSEL.

1. See LIEN, 1. *Vowell v. Bacon*, 97.
2. See FISHING GROUND. *Mason v. Mansfield*, 580.

MEDICAL SOCIETY.

A physician practising in Washington, D. C. without a license from "the Medical Society of the District of Columbia," may maintain an action at law for his services, if, during the time of those services, there was no existing "medical board of examiners of the District of Columbia." *Woodside v. Baldwin*, 174.

MEMBER OF CONGRESS.

See ASSAULT AND BATTERY, 2. *United States v. Samuel Houston*, 261.

MILL.

See EVIDENCE, 39. *Pierson v. Elgar*, 454.

MISDEMEANOR.

1. See FELONY, 4. *United States v. Larned*, 335.
2. See FORGERY, 6. *Ibid.*
3. It is a misdemeanor at common law to persuade, instigate, and incite another to commit assault and battery. *United States v. Lyles*, 469.
4. See CRUELTY, 1. *United States v. R. B. Lloyd*, 470.
5. See BAIL, 9. *United States v. Milburn*, 478.
6. See INDICTMENT, 37, 38. *United States v. Henning*, 608.

MISNOMER.

See ABATEMENT. *Brooklyn White Lead Company v. Peirce*, 531.

MISTAKE OF LAW.

1. See CONTRACT, 1. *Chesapeake and Ohio Canal Company v. Dulany*, 85.
2. See EVIDENCE, 3. *Beall v. Dick et al.* 18.

MORTGAGE.

See EQUITY, 17, 18. *Oliver v. Decatur*, 458.

MULATTO.

See BY-LAW, 6, 7, 8. *Ex parte Thomas Williams*, 343.

MURDER.

1. See EVIDENCE, 27, 28. *United States v. Taylor*, 338.
2. See JURY, 3. *United States v. McMahon*, 573.
3. See EVIDENCE, 55, 56. *Ibid.*
4. See BURGLARY, 1. *United States v. Bowen*, 604.
5. See EVIDENCE, 43, 44, 45, 46, 47, 48. *United States v. Woods*, 484.

NEGLIGENCE.

1. The owners of a stage-coach are liable for the negligence of their agent in suffering the plaintiff's slaves to be taken away in their coach; but not if the agent has used all the diligence which is customary and usual in similar cases. *Lowe v. Stockton et al.* 537.
2. In an action on the case for negligence of the defendants' driver in running against the plaintiffs' stage-coach, the plaintiffs' driver is not a competent witness for the plaintiffs without their release.
A release under the seal of one of the copartners is a sufficient release of a joint cause of action. *Beltzhoover et al. v. Stockton et al.* 695.

NEW TRIAL.

1. See JURORS, 2. *Orme v. Pratt*, 124.
2. There is no rule of practice which forbids the Court to grant a new trial where the verdict is against the weight of evidence.
A motion for a new trial is an application to the sound legal discretion of the Court. *Lloyd v. Scott*, 206.
3. See JOINT DEFENDANTS, 7. *United States v. Campbell et al.* 658.
4. See COSTS, 4. *Howe v. McDermott*, 711.

NOLLE PROSEQUI.

A *nolle prosequi*, without the consent of the defendant, after the jury has been sworn, is equivalent to an acquittal, and may be so pleaded. *United States v. Farrington*, 465.

NOTICE.

1. See DEPOSITION, 1. *Barrell v. Limington*, 70.
2. See CHESAPEAKE AND OHIO CANAL COMPANY. *Chesapeake and Ohio Canal Company v. Union Bank*, 75.
3. See DEPOSITION, 2. *Atkinson v. Glenn*, 134.
4. See BILLS AND NOTES, 3, 4. *Bank of Alexandria v. Swann*, 136.
5. A notice cannot lawfully be served on Sunday. *Chesapeake and Ohio Canal Company v. Bradley et al.* 193.
6. See GUARANTY. *Dobbins et al v. Bradley*, 298.
7. The ten days' notice required by the Act of Congress of March 1, 1823, § 7, was for the benefit of the appellant, not of the appellee. *Corporation of Washington v. Eaton*.
8. See EJECTMENT, 3. *Waters et al. v. Butler*, 371.
9. See BILLS AND NOTES, 14. *Bank of the United States v. Watterston*, 445.
10. See EVIDENCE, 54. *Bank of the United States v. Davis*, 533.
11. See CORPORATION OF GEORGETOWN, 2. *Wright v. Corporation of Georgetown*, 534.
12. See EQUITY, 21. *Caldwell v. Walters*, 577.
13. See ATTACHMENT, 8. *Davidson v. Donovan et al.* 578.
14. See BALTIMORE AND OHIO RAILROAD COMPANY, 4. *Baltimore and Ohio Railroad Company v. Van Ness*, 595.
15. See BILLS AND NOTES, 17. *Bank of the United States v. Macdonald*, 624.

NUISANCE.

1. See DISORDERLY HOUSE, 1, 20. *United States v. Jacob Dixon*, 107.
2. See BRICK-KILN, 1, 2, 3, 4. *Ward v. Corporation of Washington*, 232.
3. See CRUELTY, 2. *United States v. Jackson*, 483.
4. See DISORDERLY HOUSE, 7. *United States v. Elder*, 507.
5. See CRUELTY, 3. *United States v. Cross*, 603.

ORPHANS' COURT.

1. See GUARDIAN, 1. *United States v. Nicholls*, 191.
2. See APPEAL, 2. *Tracy v. Scott*, 250.
3. See GUARDIAN, 2. *United States v. Nicholls*, 290.
4. See APPRENTICE, 1. *Bell v. English*, 332.
5. *Id.* 2. *Hines v. Hewitt*, 471.
6. See ADMINISTRATION, 6. *Union Bank v. Smith*, 509.
7. *Id.* 10. *Laird v. Dick*, 666.
8. See APPRENTICE, 4. *Gody v. Plant*, 670.
9. *Id.* 5. *Smith v. Elwood*, 670.
10. *Id.* 7. *Smith v. Elliot*, 710.

OATH.

A promissory oath cannot be the subject of an indictment for perjury. *United States v. Glover*, 190.

PARTITION.

See EQUITY, 26, 27, 28, 29. *Shaw v. Shaw*, 715.

PERJURY.

1. See OATH. *United States v. Glover*, 190.
2. See EVIDENCE, 23, 24. *United States v. Erskine*, 299.
3. See EQUITY, 24. *United States v. Cowing*, 613.
4. See INDICTMENT, 39. *Ibid.*
5. See FREEDOM, 29. *Runaways*, &c. 489.

PEW-TAX.

Quere, whether the owner of a pew in the Protestant Episcopal Church in St. John's parish, in the city of Washington, is personally liable for the taxes assessed upon such pew by the vestry of that parish, the owner not being a member of that church. *Mauvo v. Vestry of St. John's Parish*, 116.

PLEADING.

1. See EVIDENCE, 1. *Stanback v. Waters*, 2.
2. See JOINT DEFENDANTS, 1. *Bank of Columbia v. Hyatt*, 38.
3. See APPEAL, 4. *Bank of Metropolis v. Swann*, 139.
4. After issue joined upon *nul tiel record*, and the cause is called for trial upon that

PLEADING, (*Continued.*)

- issue, the Court will not permit the defendant to plead that the plaintiff never was administrator. *Duwall v. Wright*, 169.
5. Upon the plea of "no rent-arrear," in replevin the whole burden of proof is on the party pleading it. *Hungerford v. Burr*, 349.
 6. See LIEN, 4. *King et al. v. Shaw*, 457.
 7. See EQUITY, 17, 18. *Oliver v. Decatur*, 458.
 8. The plea of "no rent-arrear," admits the demise as laid in the avowry. *Greer v. Nourse*, 527.
 9. A single bill may be declared upon according to its legal effect. Upon a plea of "payment," it is not necessary to produce in evidence the single bill; the plea admits its execution, and that it is truly stated in the declaration. *Turner v. White*, 465.
 10. See FALSE IMPRISONMENT, 2. *Ingram v. Butt*, 701.
 11. See EVIDENCE, 39. *Pierson v. Elgar*, 454.

POUNDAGE.

1. See FEES, 5. *Swann v. Ringgold*, 238.
2. See COSTS, 2. *Ringgold v. Hoffman*, 201.

POUND-BREACH.

See DAMAGES, 6. *Young v. Hoover*, 187.

PRACTICE.

1. See ASSAULT AND BATTERY, 1. *Conner v. Cockerill et al.* 3.
2. See JOINT DEFENDANTS, 1. *Bank of Columbia v. Hyatt et al.* 38.
3. A tender of money upon condition of receiving change and a receipt in full for rent, is not a legal tender. *Perkins v. Beck*, 68.
4. See CHESAPEAKE AND OHIO CANAL COMPANY, 1. *Chesapeake and Ohio Canal Co. v. Binney*, 68.
5. *Id.* 2. *Id. v. Union Bank of Georgetown*, 75.
6. See EQUITY, 3. *Bank of the United States v. Benning*, 81.
7. See DEED, 2, 3, 4, 5. *Ibid.*
8. See COPY, 1. *Ibid.*
9. See INSOLVENT, 1. *McClean v. Plumsell*, 86.
10. *Id.* 2. *Eckle v. Fitzgerald*, 90.
11. See JUDGMENT, 2. *United States v. Askins*, 98.
12. See JURORS, 2. *Orme v. Pratt*, 124.
13. See COSTS, 1. *Duwall v. Wright*, 169.
14. See PLEADING, 4. *Ibid.*
15. See FREEDOM, 7. *Negro Kitty v. McPherson*, 172.
16. In cases of felony, the prisoner is to be arraigned in the criminal bar, or dock. *United States v. Pettis*, 186.
17. See DEPOSITION, 3. *Gustine v. Ringgold*, 191.
18. See CLERK. *Ex parte E. J. Lee*, 197.
19. See EVIDENCE, 23, 24. *United States v. Erskine*, 299.
20. See APPRENTICE, 1. *Bell v. English*, 332.
21. See BILLS AND NOTES, 10, 11. *Stettinius v. Myer*, 349.
22. See EVIDENCE, 38. *Deale v. Krofft*, 448.
23. The defendant cannot set off the plaintiff's acceptance of the defendant's draft not due at the commencement of the suit, but due before plea pleaded; nor can it be allowed as payment on the general issue of non assumpsit. *Ibid.*
24. If the last indorser take up a draft when due he may cancel the names of the prior indorsers without impairing his title to recover, as indorsee, against the acceptor. *Ibid.*
25. See LIEN, 4. *King et al. v. Shaw*, 457.
26. See EQUITY, 17, 18. *Oliver v. Decatur*, 458.
27. See ASSAULT AND BATTERY, 4. *United States v. Henry Lloyd*, 468.
28. See EVIDENCE, 43, 44, 45, 46, 47. *United States v. Woods*, 484.
29. See ATTACHMENT, 10, 11, 12. *Negro John Thornton v. Davis*, 500.
30. A replevin discontinued at March term, 1834, by negligence of the clerk, was reinstated at March term, 1835. *McDermott v. Naylor*, 527.
31. See BOOKS AND PAPERS, 1, 2. *Walker v. Stewart*, 532.
32. See JOINT DEFENDANTS, 4. *McCundless v. McCord*, 533.

PRACTICE, (*Continued.*)

33. When a special session of the Court is ordered for the trial of criminal causes, the criminal causes pending at the preceding regular term, cannot be continued to the special session, nor can any order be made therein at such special session. *United States v. Milburn*, 552.
34. *Quere*, whether a new *capias ad respondendum* for a misdemeanor, can be issued while the party is in custody of his bail upon a former *capias* for the same offence; he having failed to appear according to the tenor of the recognizance of bail. *Ibid.*
35. See ATTACHMENT, 13. *Ex parte Gorman*, 572.
36. See EXECUTION, 8. *Linthecum v. Jones*, 572.
37. See EQUITY, 21. *Caldwell v. Walters*, 577.
38. *Id.* 22. *Oliver v. Decatur*, 592.
39. See JURY, 5, 6, 7, 8. *United States v. Stockwell et al.* 671.
40. *Id.* 9, 10. *United States v. Fenwick et al.* 675.
41. See GUARANTY, 4, 5, 6. *Burns v. Semmes*, 702.
42. See COSTS, 4. *Howe v. McDermott*, 711.
43. In a criminal prosecution, the Court will not hear a motion to quash the indictment until the defendant has been taken. *United States v. Taylor*, 731.
44. When a statute creates an offence, and directs the particular mode of prosecution, that mode must be adhered to. *Ibid.*

PRIVILEGE.

1. See FOREIGN MINISTER, 1. *United States v. Lafontaine*, 173.
2. See ASSAULT AND BATTERY, 2. *United States v. Samuel Houston*, 261.
3. See FOREIGN MINISTER, 2. *United States v. Madison Jeffers*, 704.

PROSECUTOR.

1. See JUDGMENT, 4. *United States v. Turley*, 334.
2. See INDICTMENT, 19. *United States v. H. Lloyd*, 467.
3. *Id.* 17. *Id.* 464.

PUBLIC WORSHIP.

The disturbance of public worship, is an act tending to destroy the public morals, and to a breach of the peace. It is a common injury to an indefinite number of persons, neither of whom could sue alone; it is, therefore, an indictable offence at common law. *United States v. John Brooks*, 427.

PURSER.

1. See ACCOUNT, 1. *United States v. Fitzgerald*, 203.
2. The duties of a purser in the navy, stationed at a navy-yard, are not defined by law, and are to be ascertained by the jury. *Ibid.*
3. See EQUITY, 13. *Ibid.*
4. The pursers are bound by the regulations made by the commissioners of the navy in 1817, and are thereby bound to make the disbursements required, without other compensation than their regular pay as pursers, unless there was an agreement or understanding between them and some officer of the United States competent to make such agreement, that they should receive extra compensation therefor. *Ibid.*

QUO WARRANTO.

See INFORMATION, 2, 3. *Gunton et al. v. Ingle et al.* 438.

RAILROAD.

See BALTIMORE AND OHIO RAILROAD COMPANY, 2, 3, 4, 5. *Baltimore and Ohio Railroad Co. v. Van Ness*, 595.

RECEIVER.

1. See EQUITY, 17. *Oliver v. Decatur*, 458.
2. *Id.* 25. *Dick v. Laird*, 667.

RECOGNIZANCE.

1. See JUDGMENT, 2. *United States v. Askins*, 98.
2. See EVIDENCE, 23, 24. *United States v. Erskine*, 299.
3. See BAIL, 9. *United States v. Milburn*, 478.
4. See FINE AND COSTS. *United States v. Hilliard*, 644.

REGISTER OF THE TREASURY.

See AGENT, 1. *United States v. Nourse*, 151.

RELEASE.

See NEGLIGENCE, 2. *Beltzhoover v. Stockton*, 695.

RENT.

1. The lessor's title ceased by a sale of the property. The tenant did not attorn, nor in any manner acknowledge himself to be tenant to the vendee, but continued to use and occupy the premises for five years after the sale; the vendee not having taken possession or demanded the rent. *Held*, that the lessor, the plaintiff, could not recover from her tenant, in an action for use and occupation, the rent for the time he thus used and occupied the premises. *Betty Blake v. Grammer*, 13.
2. The want of title in fee in the plaintiff is no bar to an action for rent upon a lease for seven years with leave to purchase the fee-simple within that term. *Crampton v. Van Ness*, 350.
3. To enable a landlord to recover double rent for holding over, the lease must be for a specific term.
A renting at sixty dollars a year, payable monthly, is not for a specific term, and will not authorize a judgment for double rent. *Nixdorff v. Wells*, 350.
4. There can be no set-off against avowry for rent. *Roach v. Burgess*, 449.
5. See DISTRESS, 2. *Baker v. Jeffers et al.* 707.
6. See BILLS AND NOTES, 19. *Griffin v. Woodward*, 709.
7. See ATTACHMENT, 9. *Calvert v. Stewart*, 728.
8. See BILLS AND NOTES. *Bank of the United States v. Fleet Smith*, 712.

RENTS AND PROFITS.

See DEED, 10. *Kurtz v. Hollingshead*, 180.

REPLEVIN.

1. See EVIDENCE, 4. *Williamson v. Ringgold*, 39.
2. See EXECUTION, 1. *Ibid.*
3. See EVIDENCE, 13. *Hilton v. Beck*, 107.
4. *Id.* 22. *Semmes v. Sprigg*, 292.
5. *Id.* 32. *Hungerford v. Burr*, 349.
6. See DISCONTINUANCE. *McDermott v. Naylor*, 527.
7. See PLEADING, 8. *Greer v. Nourse*, 527.
8. See BILLS AND NOTES, 19. *Griffin v. Woodward*, 709.
9. See ATTACHMENT, 9. *Calvert v. Stewart*, 728.

RIOT.

1. See JUDGMENT, 8. *United States v. Peaco et al.* 601.
2. See JURY, 6, 7, 8. *United States v. Stockwell et al.* 671.
3. *Id.* 9, 10. *United States v. Fenwick et al.* 675.

ROAD.

1. The obstruction of a way laid out for the accommodation of the owners of certain lots, by the original proprietor thereof and not as a common highway, is not properly the subject of indictment. And the circumstance that the public might pass over a road, does not make it a public road; although laid off and dedicated by the original owner of the land as a public road and ever since used as such. *United States v. Conrad Schwarz*, 160.
2. There can be no public road in the County of Washington, D. C., out of the cities and towns, unless it be recorded in this Court, or the Levy Court. *Ibid.*
3. The road from Georgetown, D. C., to the Little Falls bridge, is not a public highway, because the location thereof was not recorded among the records of the Territory of Columbia. *United States v. Emery*, 270.
4. The Act of Maryland of 1785, c. 49, respecting private roads or ways, is not repugnant to the Constitution of the United States, and is in force in the county of Washington. *Barnard et al., Petitioners*, 294.

ROBBERY.

1. To constitute robbery, there must be fear or force. *United States v. Negro Henry Simms*, 618.
2. See JUSTICE OF THE PEACE. *Ibid.*
3. See JOINT DEFENDANTS, 7. *United States v. Campbell & Turner*, 658.

RUNAWAYS.

1. See RUNAWAYS AND PETITIONERS FOR FREEDOM. 489.
2. In an indictment under the Maryland law of 1796, c. 67, § 19, for assisting, by advice, the transporting of a slave, whereby the owner was deprived of his services, it is not necessary to state what the advice was, nor how it assisted him; nor is it necessary to state a criminal intent, nor that the accused knew he was a slave and intended to run away. *United States v. Abraham Johnson*, 303.

SALE.

1. See FRAUD, 1. *Cushwa v. Forrest*, 37.
2. In 1828, city lots in Washington, D. C., could not be sold for taxes due to the corporation, if there was upon them personal property sufficient to pay the taxes. The charter of 1820, was the only authority under which such lots could be sold, and that charter does not, in such case, authorize the sale of the lots by the collector, even with the consent of the person to whom they are assessed, or even with the assent of the true owner. The collector could not sell the fee-simple, if the tenant was tenant for life only, and if the estate for life was of sufficient value to pay the taxes. *Quere*, whether the tenant, in whose name a lot is assessed, can, by suffering the taxes to accumulate and by purchasing in the lot, at a collector's sale for his own default, get a better title than he had before? *Helbrigle v. Ould*, 72.
3. See BY-LAW, 1, 2. *Corporation of Georgetown v. Smith*, 91.
4. See CONTRACT, 2, 3, 4. *Arden v. Brown*, 121.
5. See CORPORATION OF GEORGETOWN, 1. *Corporation of Georgetown v. Bank of the United States*, 176.
6. See DEED, 1, 8, 9, 10, 11. *Kurtz v. Hollingshead*, 180.
7. See ADMINISTRATION, 1. *Ex parte Jones*, 185.
8. See EJECTMENT, 3. *Waters et al. v. Butler*, 371.

SET-OFF.

1. See EQUITY, 2. *Ashton v. McKim*, 19.
2. See BILLS AND NOTES, 10, 11. *Stettinius v. Myer*, 349.
3. See EVIDENCE, 38. *Deale v. Krofft*, 448.
4. See RENT, 4. *Roach v. Burgess*, 449.
5. See LIMITATION, 7. *Chew v. Baker*, 696.

SLANDER.

1. Upon a demurrer to a declaration in slander, if any of the words are actionable the judgment must be for the plaintiff. *Edds v. Waters*, 170.
2. It is not actionable to say of a white man that he is a "yellow negro;" "a villain, and a liar," although the plaintiff has previously intermarried with a white woman, which marriage would have been unlawful if he had been a negro or mulatto; there being no colloquium respecting the marriage, nor any marriage averred. Neither the Constitution of Maryland nor any statute of that State, or of the United States deprives a colored person, merely as such, of any civil rights of a citizen. *Johnson v. Brown*, 235.
3. Mere words of disgrace, unless written and published, are not actionable. *Ibid*.
4. See AFFIDAVIT, 3. *Stettinius v. Orme*, 342.
5. See BAIL, 9. *Doyme v. Barker*, 475.

SLAVE.

1. See FREEDOM, 1. *Negro Christopher Harris v. Alexander*, 1.
2. See EVIDENCE, 1. *Stanback v. Waters*, 2.
3. See FREEDOM, 2. *Negro Quando v. Clagett*, 17.
4. *Id.* 3. *Negro Simon v. Payne*, 99.
5. *Id.* 4, 5. *Negro Thomas Butler et al. v. Duvall*, 167.
6. *Id.* 6. *Negro Emanuel Gilbert v. Ward*, 171.
7. *Id.* 7. *Negro Kitty v. M Pherson*, 172.
8. *Id.* 8, 9. *Negro Mary v. Talburt*, 187.
9. *Id.* 10, 11. *Negro Samuel v. Childs*, 189.
10. See FOREIGN LAW. *Negro Delilah v. Jacobs*, 238.
11. See FREEDOM, 12. *Negro Esther v. Buckner*, 253.
12. A count under the Maryland Act of 1796, c. 67, § 19, for giving a pass to a slave, is bad if it do not aver that the master or owner was thereby deprived of the service of the slave. But upon conviction of a free person, upon an indictment under the tenth section of the Maryland Act of 1751, c. 14, for enticing a slave

SLAVE, (*Continued.*)

- to run away, and who actually ran away, the offender may be fined under the nineteenth section of the Act of 1796, c. 67, without an averment of loss of service. *United States v. John W. Prout*, 301.
13. See RUNAWAYS, 2. *United States v. Abraham Johnson*, 303.
 14. See FREEDOM, 13. *Negro Clara Moore v. Jacobs*, 312.
 15. *Id.* 14. *Negro Rebecca Hobbs v. Magruder et al.* 429.
 16. See MANUMISSION, 5. *Negro Eliza and Kitty Chapman v. Fenwick*, 431.
 17. See EVIDENCE, 36. *Negro Robert Thomas v. Magruder*, 446.
 18. See FREEDOM, 16. *Negro Fred. Bowman v. Barron*, 450.
 19. *Id.* 17. *Negro Jo Crawford v. Slye*, 457.
 20. *Id.* 18. *Negro Keziah v. Slye*, 463.
 21. See ASSAULT AND BATTERY, 4. *United States v. R. B. Lloyd*, 468.
 22. See CRUELTY, 1. *Id.* 470.
 23. See LARCENY, 5. *United States v. Negro Nathan, a slave*, 470.
 24. See FREEDOM, 19. *Negro Ann Brooks v. Nutt*, 470.
 25. See ATTACHMENT, 10, 11, 12. *Negro John Thornton v. Davis*, 500.
 26. See INDICTMENT, 29, 30, 31. *United States v. Negro Henry Frye, a slave*, 539.
 27. See FREEDOM, 28. *Negro Charles Taylor v. Buckner*, 540.
 28. See INDICTMENT, 33. *United States v. Negro Nelson*, 579.
 29. See FREEDOM, 21, 22. *Negro Rachel Brent v. Armfield*, 579.
 30. See BURGLARY. *United States v. Negro John A. Bowen, a slave*, 604.
 31. See INDICTMENT, 40. *United States v. Spalding*, 616.
 32. See JUSTICE OF THE PEACE, 14. *United States v. Simms*, 618.
 33. See FREEDOM, 23. *Negro William Fenwick v. Tooker*, 641.
 34. *Id.* 24. *Negro Sam and Barbara Lee v. Lee*, 643.
 35. See KIDNAPPING, 1, 2, 3. *United States v. Henning*, 645.
 36. See FREEDOM, 26, 27. *Negro Herbert Harris v. Firth*, 710.
 37. See INDICTMENT, 37, 38. *United States v. Henning*, 608.
 38. The defendant's male servant, being, by consent of the plaintiff and defendant, at the plaintiff's house upon a visit to his wife, who was the slave of the plaintiff, was taken suddenly ill of the smallpox, and after being nursed three weeks by the plaintiff, died at her house.
- The defendant, as soon as he knew of the sickness of his slave, offered to remove him to his own house, but the plaintiff would not consent to the removal. Upon this evidence the Court instructed the jury that the plaintiff could not recover. *Martha Manning v. Florentius Cox*, 693.

SPECIAL SESSION.

1. The Circuit Court of the District of Columbia cannot, at a special session for the trial of criminal causes, try a cause which was depending at the preceding stated session. *See Memorandum*, 337.
2. The Circuit Court of the District of Columbia has power to hold special sessions for the trial of criminal causes; and has jurisdiction at a special session, to try offences committed between the time of ordering and the time of holding such session; and its jurisdiction is not limited to such causes of federal jurisdiction as may be tried in a Circuit Court of the United States sitting in a State. *United States v. Christiana Williams*, 372.
3. The Circuit Court of the District of Columbia has all the powers which were, by law, vested in the circuit courts of the United States, on the 27th of February, 1801. and, among others, the power to send attachments into any other district for witnesses in criminal causes. *Ibid.*
4. When a special session of the Court is ordered for the trial of criminal causes, the criminal causes pending in the preceding regular term cannot be continued to the special session; nor can any order be made therein at such special session. *United States v. George Milburn*, 552.

STAGE-COACH.

1. See NEGLIGENCE, 1. *Lowe v. Stockton et al.* 537.
2. *Id.* 2. *Beltzhoover v. Stockton et al.* 695.

STREETS.

- See CORPORATION OF GEORGETOWN, 2. *Wright v. Corporation of Georgetown*, 534.

SUNDAY.

- See NOTICE, 5. *Chesapeake and Ohio Canal Co. v. Bradley et al.* 193.

SUPERCARGO.

1. A supercargo has a right to retain, for a general balance due to him by the owners, notwithstanding their assignment of the cargo and bill of lading to a trustee for the benefit of certain creditors. *Vowell v. West*, 100.
2. A supercargo, who receives his instructions from the ostensible owners of the whole cargo, has a right to retain, out of the whole proceeds of the cargo, the amount of a general balance due to him from such ostensible owners, although there may be another part owner, whose interest was not disclosed to him until he had settled his account with such ostensible owners.
In such case the secret part owner cannot compel the supercargo to account with him. *Lockett v. West et al.* 101.
3. See EQUITY, 23. *Stewart v. Callaghan*, 594.

SUPERSEDEAS.

1. See JUDGMENT, 6. *Plant v. Holtzman*, 441.
2. See EXECUTION, 10. *Chesapeake and Ohio Canal Co. v. Barcroft*, 659.

TAXES.

1. See SALE, 2. *Hellrigle v. Ould*, 72.
2. See CORPORATION OF ALEXANDRIA. *Farmers Bank v. Fox*, 330.

TENDER.

See PRACTICE, 3. *Perkins v. Beck*, 68.

TRESPASS.

See EVIDENCE, 12. *Reynolds v. Baker*, 104.

TRUST.

1. See DEED, 5. *Bank of the United States v. Benning*, 81.
2. See EQUITY, 10, 11. *Nicholson v. McGuire*, 194.
3. See EJECTMENT, 3. *Waters et al. v. Butler*, 371.
4. The trustee of a family settlement, in which infants are interested, may be changed by consent of the parties, upon a bill filed for that purpose only. *Young v. Young*, 499.
5. See BARON AND FEME, 4. *Marshall v. Dorsett*, 696.

USE AND OCCUPATION.

See RENT, 1. *Blake v. Grammer*, 13.

USURY.

1. See DISCOVERY, 1. *Breckenridge v. Peter*, 15.
2. A rent-charge or annuity of \$500 a year, in consideration of \$5,000 advanced and paid therefor, is not usurious on the face of the grant, although it contain the following covenants, namely: that the grantor will pay the said rent as it shall become due; and if not punctually paid, that the grantee may enter and distrain therefor; and that if the rent shall remain thirty days unpaid, and no sufficient distress found on the premises charged, the grantee may enter and from thence remove and expel the grantor, his heirs, and assigns, and hold and enjoy the same as his absolute estate forever thereafter; that the grantor will keep the buildings insured against fire, and will execute and deliver any further conveyance necessary, more completely to charge the premises with the said annuity, and to carry into effect the intention of the parties. And a covenant on the part of the grantee, that if the grantor, at any time after the expiration of five years, should pay to the grantee \$5,000, and all arrears of rent, the grantee would execute and deliver to the grantor any deed or instrument necessary for releasing and extinguishing the said rent or annuity, which, on such payment, should thereafter forever cease to be payable.
Nor is it a good plea in bar of an avowry of distress for rent due by such a grant, that the deed was made in pursuance of an agreement that the grantee should "advance" to the grantor \$5,000, in consideration of which the grantor should, by such a deed, grant to the grantee an annuity or rent of \$500, with the covenants aforesaid; although the plea aver that "so" the said deed was made "in consideration of money advanced upon and for usury;" "and there has been reserved and taken above the rate of six dollars in the hundred for the forbearance of the said sum of \$5,000 for the term of one year."

Nor is it a good plea in bar of such an avowry, to say, that the deed was made in

USURY, (*Continued.*)

pursuance of an agreement that the grantee should "lend" \$5,000 to the grantor upon the terms and with the covenants contained in the said deed; although the plea aver that "so" the said grantor saith the deed was made "in consideration of money lent upon and for usury;" and that "by the said indenture there has been reserved and taken above the rate of six dollars in the hundred for the forbearance of the said sum of \$5,000, so lent, as aforesaid, for the term of one year."

Nor is it a good plea in bar of such an avowry, to say, that the said deed was made in pursuance of an agreement that the grantee should advance to the grantor \$5,000, upon the terms and conditions, and in consideration of the covenants in the said indenture mentioned and contained, "and so the said John saith that the said deed of indenture was made in consideration of money advanced upon and for usury, and that by the said indenture there has been reserved and taken above the rate of six dollars in the hundred, for the forbearance of the said sum of \$5,000 so advanced, as aforesaid, for the term of one year."

Nor is it a good plea in bar of such an avowry, to say, that the said deed was made in pursuance of an agreement that the grantee should "lend" to the grantor \$5,000, "upon the terms and conditions, and in consideration of the covenants and agreements in the said indenture mentioned and contained, and that he did so "lend," &c., "and so the said John saith that the said deed of indenture was made in consideration of money lent upon and for usury, and that by the said indenture there hath been reserved and taken above the rate of six dollars in the hundred for the forbearance of the said sum of \$5,000 so lent as aforesaid, for the term of one year." *Lloyd v. Scott*, 206.

3. There is no rule of law or practice which forbids the Court to grant a new trial, where the verdict is against the weight of evidence. *Ibid.*
4. A motion for a new trial is an application to the sound legal discretion of the Court. *Ibid.*
5. The contract prohibited by the statute of usury in Virginia, is a contract to receive something for forbearance; that is, for forbearing to enforce some debt or right; and unless there was a right to demand payment, there could be no forbearance; and if no forbearance, no usury. *Ibid.*
6. See INTEREST, 2. *Oliver v. Decatur*, 461.
7. It is usury to take two and a half per cent. commission beside the usual bank discount. *Nicholls v. Wright*, 700.
8. The drawer of an inland bill, is not a competent witness to prove usury, in an action against the acceptor. *Ibid.*

VARIANCE.

1. See BILLS AND NOTES, 5. *Carrington v. Ford*, 231.
2. *Id.* 15. *United States v. John Lee*, 446.
3. *Id.* 1. *Stone v. Lawrence*, 11.

VERDICT.

1. Upon a special verdict, the Court cannot, from the facts found, infer other facts which the jury might have inferred, but have not found. *Bank of Alexandria v. Swann*, 136.
2. See CONTRACT, 6. *Corcoran v. Dougherty*, 205.
3. See ASSAULT AND BATTERY, 5. *United States v. R. B. Lloyd*, 472.

WAGER.

1. See ELECTION. *Denney v. Elkins*, 161.
2. A wager may be recovered at common law. *Fleming v. Foy*, 423.

WIDOW.

See DEVISE. *Farmers Bank v. Hoof*, 323.

WILL.

1. See FREEDOM, 6. *Negro Emanuel v. Ward*, 171.
2. *Id.* 7. *Negro Kitty v. M'Pherson*, 172.
3. *Id.* 10, 11. *Negro Samuel v. Childs et al.* 189.
4. See MANUMISSION, 5. *Negro Eliza Chapman v. Fenwick*, 431.
5. *Id.* 1. *Negro Quando v. Claggett*, 17.

WITNESS.

1. See EVIDENCE, 13. *Hilton v. Beck*, 107.
2. See DEPOSITION, 3. *Gustine v. Ringgold*, 191.
3. See SPECIAL SESSION, 2. *United States v. Christiana Williams*, 372.
4. See BILLS AND NOTES, 15. *United States v. Lee*, 446.
5. A witness is not incompetent because he feels bound in honor to indemnify the party who calls him as a witness, in case the judgment should be against him; if he has made no promise to indemnify him, nor is bound in law so to do. *Corporation of Washington v. Fowler*, 458.
6. See EVIDENCE, 41. *United States v. Anderson*, 476.
7. *Id.* 42. *United States v. Masters*, 479.
8. *Id.* 43 to 48 (inclusive.) *United States v. Woods*, 484.
9. *Id.* 53. *Wallar v. Stewart*, 532.
10. *Id.* 54. *Bank of the United States v. Davis*, 533.
11. See ATTACHMENT, 13. *Ex parte J. B. Gorman*, 572.
12. See EVIDENCE, 57. *United States v. Davidson et al.* 576.
13. *Id.* 58. *United States v. Jackson*, 577.
14. A mulatto, born of a white woman, and not in a state of servitude by law, is a competent witness for a white man. *United States v. Davis*, 606.
15. Serving out the term of imprisonment in the penitentiary, for felony, does not restore the party to his competency as a witness. *United States v. Brown*, 607.
16. See JOINT DEFENDANTS, 7. *United States v. Campbell et al.* 658.
17. See ASSAULT AND BATTERY, 9. *United States v. Fitton*, 658.
18. Free negroes and mulattoes, not born of white women, are not competent witnesses against free negroes and mulattoes not in a state of servitude by law. *United States v. Negro Beddo et al.* 664.
19. See EVIDENCE, 63. *United States v. Fenwick et al.* 675.
20. *Id.* 64. *United States v. Tarlton*, 682.
21. *Id.* 66. *United States v. Crandell*, 683.
22. See NEGLIGENCE, 2. *Beltzhoover v. Stockton*, 695.
23. See USURY, 8. *Nicholls v. Wright*, 700.

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